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No.

In the

Supreme Court of the United States

STEPHEN P. SUGARBAKER

Petitioner,

versus

SSM HEALTHCARE, d/b/a ST. MARYS HEALTH CENTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE LOWER COURT ERRED IN AFFIRMING SUMMARY JUDGMENT AGAINST PETITIONER UNDER THE HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986, 42 U.S.C. §§ 11101 *ET SEQ.* ("HCQIA") BY APPLICATION OF AN "UNCONVENTIONAL" AND "UNUSUAL" BURDEN OF PROOF STANDARD OF REVIEW FOR SUMMARY JUDGMENT THAT JUDICIALLY RESOLVED WITHOUT A TRIAL A GENUINE ISSUE OF MATERIAL FACT;**

II. **WHETHER THE LOWER COURT, ACTING CONTRARY TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT, ERRED IN AFFIRMING SUMMARY JUDGMENT AGAINST PETITIONER BY CONCLUDING THAT EVIDENCE OF CONTRARY OPINIONS FROM PETITIONER'S EXPERTS THAT CREATED A GENUINE ISSUE OF MATERIAL FACT WERE IRRELEVANT UNDER HCQIA.**

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") is set forth in the Appendix ("App." at 1a), and is reported at 190 F.3d 905. The Order of the United States District Court for the Western District of Missouri ("District Court"), dated June 10, 1998, is unreported and is set forth in the Appendix (App. at 28a).

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for the Court's jurisdiction is 28 U.S.C. § 1254. The Eighth Circuit entered its order on August 19, 1999. This Petition was filed within 90 days of that date and is thus timely.

STATUTES INVOLVED

(See Appendix p. 35a)

STATEMENT OF THE CASE

A. Introduction

St. Marys Health Center ("St. Marys"), a private hospital owned and operated by SSM Health Care in Jefferson City, Missouri, suspended, restricted and ultimately terminated the medical staff privileges of the Petitioner, Dr. Stephen P. Sugarbaker ("Dr. Sugarbaker"), a general surgeon. St. Marys reported these actions to the Missouri state medical licensing authority (and thus to the National Practitioner Data Bank ("Data Bank")), stating that its actions were based on Dr. Sugarbaker's "Incompetence/Malpractice/Negligence" (R. 1166-67, 2720,

2465). St. Marys, however, never found Dr. Sugarbaker to be "incompetent," "negligent" or guilty of "malpractice" (R. 2720-22). St. Marys' actions devastated Dr. Sugarbaker's medical practice and career as a physician.

B. Background

In early 1994, Dr. Richard Jennett, President of Jefferson City Medical Group, P.C. ("JCMG"), the largest physician group in Jefferson City, directed JCMG's top administrator to "go call . . . Dr. Sugarbaker, [he is a] good doctor, [to] see if he would like to join our group" (R. 2844). At that time, Dr. Jennett declared privately to others "that JCMG would 'before long' either 'own' the medical practice of every independent physician in Jefferson City or would 'run every one of them out of town'" (R. 2610, 2692-93). Dr. Sugarbaker, who at that time was an Assistant Professor of Surgery at the University of Missouri at Columbia ("MU"), refused JCMG's offer because he "wanted to go into solo practice" in Jefferson City and build upon the substantial reputation of his father, a retired Jefferson City general surgeon (R. 2844-45).

C. Dr. Sugarbaker's Peer Review at St. Marys

A general surgeon who practices at St. Marys and who participated in the peer review process involving Dr. Sugarbaker, and who is neither a social friend nor business partner of Dr. Sugarbaker, testified that "Dr. Sugarbaker was subjected to a very peculiar peer review that is unlike anything else that I have seen at St. Marys. . . . [His medical practice] fell within the standard of care, and that's not what's been asked [in the peer review]" (R. 2607, 2610, 2683). St. Marys admits that none of Dr. Sugarbaker's

cases contained any event that caused or "would cause an immediate review by [the] quality assurance" process at St. Marys (R. 2711). Following a "full review" of Dr. Sugarbaker's cases, St. Marys summarily suspended Dr. Sugarbaker's medical staff privileges, stating five specific "areas of concern" (R. 2750, 1222).

An Ad Hoc Committee composed of **independent** physicians, including two general surgeons, was appointed to review the "areas of concern" and Dr. Sugarbaker was required to defend his care of 18 separate patients, involving 10 types of procedures (R. 2751, 1226-29, 2757, 3421, 3424). Dr. Sugarbaker "bore the burden" at the Ad Hoc Committee hearing of "proving that St. Marys suspension of his privileges was **arbitrary, capricious** and/or **lacking in any factual basis**" (R. 2640, 3380-81) (emphasis added). According to the Chair of the Ad Hoc Committee, Dr. Sugarbaker's presentation to the Ad Hoc Committee was "thorough and complete and impressive" (R. 3380), including "a medical, scientific documentation of events of surgery and blood loss and operating times" (R. 3379-80). The Ad Hoc Committee unanimously ruled the suspension imposed by St. Marys should immediately be "ended":

> After a thorough discussion of the testimony, exhibits, slides and arguments presented, the [Ad Hoc] Committee voted to recommend . . . that Dr. Sugarbaker's precautionary summary suspension be ended.

(R. 2759-60, 3419, 3381, 3383, 1164).

Dr. Loren Humphrey, a distinguished former Chairman and Professor of Surgery at both the University of Missouri-Columbia and the University of Kansas, who participated in the Ad Hoc Committee hearing, remarked at

its conclusion: "I have a hard time understanding what these charges have to do with patient care" (R. 2757, 3535, 3540).[1]

Despite the ruling of the Ad Hoc Committee and without informing Dr. Sugarbaker of the result, St. Marys continued his suspension and required him to appear again before St. Marys' medical executive committee ("St. Marys MEC") to defend his care of six of the patients previously considered by the Ad Hoc Committee (R. 2768-69). After this second hearing, St. Marys MEC voted to terminate Dr. Sugarbaker's privileges allegedly due to his care of the six patients (R. 3152, 1165) St. Marys later, following a further hearing recommending a restriction of his privileges, terminated Dr. Sugarbaker's privileges at St. Marys (R. 1166-67).

With one notable exception, none of the six patient cases involved the "areas of concern" used to justify St. Marys initial suspension of Dr. Sugarbaker's privileges (R. 3019-22, 3402, 3410, 3412, 2768, 3039, 2753-54, 1163).[2] Significantly, St. Marys ultimately **admitted** "the peer review record contains evidence that, in the six cases on which St. Marys based its peer review decision,

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[1] St. Marys had determined in advance of the Ad Hoc Committee Hearing not to call any witnesses (R. 2798). St. Marys later disingenuously claimed the Ad Hoc Committee's decision was deficient because of a lack of such information (R. 3147).

[2] The notable exception concerns three of the six patient cases (Laparoscopic Cholecystectomy Cases) in which St. Marys claims the "amount of time" Dr. Sugarbaker took to complete the procedures was excessive. This "concern" was universally denounced by all experts, including St. Marys' experts, as an improper basis for disciplining Dr. Sugarbaker (R. 3147-48, 2689, 3167, 2887, 3404-05, 2776, 3619). St. Marys' other initial concerns related to "breast biopsies." None of the six patients' cases involve breast biopsies (R.3039).

Dr. Sugarbaker provided acceptable care" (R. 1518). St. Marys' medical expert acknowledged each of the six patients "had favorable outcomes" (R. 3398). None of the "issues" ultimately identified by St. Marys as the basis for its disciplinary action against Dr. Sugarbaker actually pertained to **surgery** performed by Dr. Sugarbaker; they concerned other issues (e.g., patient feeding, medical records documentation).[3]

D. Dr. Sugarbaker's Lawsuit

Dr. Sugarbaker brought this action against St. Marys in the District Court alleging unlawful restraint of trade under Section 1 of the Sherman Act and several state law claims, including libel. At the close of discovery, St. Marys filed a motion for summary judgment seeking immunity under HCQIA. In response, Dr. Sugarbaker submitted to the District Court, among other evidence, the expert opinion testimony of two Missouri general surgeons who testified that no objectively reasonable medical practitioner could have

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3 In the "Colectomy Case," St. Marys' experts acknowledged the patient had no adverse outcome and Dr. Sugarbaker's surgery was without complication or adverse event (R. 3276-77, 3398). One of the St. Marys peer review surgeons (and Dr. Sugarbaker's expert) testified: "It is a ridiculous argument . . . [to address] whether he fed the patient or not. . . . I guarantee Dr. Sugarbaker took care of this patient expertly and appropriately" (R. 2688). Similarly, in the "Air Embolism Case," Dr. Sugarbaker was criticized for not "documenting" an air embolism that never occurred (R. 2631-33, 3397, 3415). Finally, St. Marys exaggerated to a reprehensible degree the "Neck Trauma Case," falsely claiming Dr. Sugarbaker had failed by "not putting a knife in [the patient's] throat" fast enough (R. 2613, 2904-20, 3838). The Eighth Circuit incorrectly adopted the characterization of these medical cases in the light most favorable to St. Marys.

imposed the restrictions St. Marys did on Dr. Sugarbaker (R. 2609-10, 2884-85).

E. Decisions of the District Court and Eighth Circuit

On June 10, 1998, the District Court granted summary judgment to St. Marys using what the District Court described as a "rather odd summary judgment standard." Improperly applying a "subjective" test to the evidence and deciding for itself a genuine issue of material fact, the District Court held St. Marys' actions against Dr. Sugarbaker were "in the furtherance of quality health care" under HCQIA because St. Marys allegedly "did in fact have such a belief."

Dr. Sugarbaker appealed to the Eighth Circuit. The Eighth Circuit affirmed, applying what it described as an "unconventional twist" to the burden of proof on summary judgment under HCQIA. Beyond misapplying the burden of proof, the Eighth Circuit affirmed summary judgment by resolving conflicts in the evidence in the light most favorable to St. Marys and declaring opposing expert testimony offered by Dr. Sugarbaker to be "irrelevant." The Eighth Circuit further held "whether [St. Marys'] concerns ultimately proved to be medically sound" and the "subjective bias and bad faith motives" of St. Marys peer reviewers also were "irrelevant" under HCQIA. The genuine issue of material fact shown in the evidence by Dr. Sugarbaker was decided by the Eighth Circuit without affording Dr. Sugarbaker a trial on the merits.

ARGUMENT

I. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

All Courts of Appeals but the Tenth Circuit have universally applied what they admit to be an "unconventional" and "unusual" burden of proof for summary judgment under HCQIA. These courts have employed this unconventional and unusual standard summarily to deny relief to physicians seeking redress in federal court for anticompetitive conduct committed by hospitals and others in peer review proceedings. These Courts of Appeals, and numerous district courts following them, have declared the correctness of any medical determination in the peer review process and the expert opinions proffered by plaintiffs to be "irrelevant" for summary judgment under HCQIA.

Except briefly in a footnote in each of *Patrick v. Burget*, 486 U.S. 94, 105 n.8 (1988) and *Summit Health, LTD, v. Pinhas* 500 U.S. 322, 332 n.12, this Court has not addressed HCQIA since it was enacted nearly 14 years ago, yet a substantial body of caselaw has developed in the lower courts. Like many of those cases, this case at its core concerns access to federal court. This also highlights the consistent misapplication of the burden of proof for summary judgment by numerous Courts of Appeals and district courts, including the District Court and Eighth Circuit here. The Tenth Circuit has refused to apply the evidentiary principles and burden of proof applied by the Eighth Circuit and the other Courts of Appeals, thus creating a split among the Courts of Appeals necessitating this Court's review. Dr. Sugarbaker respectfully requests the Court grant his petition for writ of certiorari.

II. FEDERAL COURTS ARE DENYING DR. SUGARBAKER AND OTHER PHYSICIANS ACCESS TO THE FEDERAL COURTS BY APPLYING AN "UNCONVENTIONAL TWIST" AND "UNUSUAL" BURDEN OF PROOF TO SUMMARY JUDGMENT UNDER HCQIA.

The advent of managed health care has dramatically altered the relationships among physicians and the hospitals where they practice. Physician groups now routinely enter into agreements with hospitals that effectively control health care services in small communities such as Jefferson City. At the same time, members of those physician groups constitute the hospital committees that conduct peer review of their competitors. Where a physician group dominates a hospital's peer review committees, it can determine whether an independent, solo practitioner such as Dr. Sugarbaker will be allowed medical staff privileges.

Through HCQIA, Congress provided limited immunity to certain persons for particular types of "professional review actions" taken during the course of medical peer review. "Initially, the [House] Committee [on Energy and Commerce] considered establishing a very broad protection from suit for professional review actions." H.R. Rep. No. 99-903, 99th Cong., 2d Sess., 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6391. "In response to concerns that such protection might be abused and serve as a shield for anticompetitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection." *Id.* As enacted, HCQIA provides only a *rebuttable presumption* "for proper peer review." *See id.*

Courts in a majority of the circuits, including the Eighth Circuit, have used the rebuttable presumption under

HCQIA to create an "unconventional" and "unusual" burden of proof and standard of review for summary judgment, even though no such rule exists under Fed. R. Civ. P 56. *See, e.g., Benjamin v. Aroostook Medical Ctr.*, 937 F. Supp. 957, 973 (D. Me. 1996), *aff'd*, 113 F.3d 1 (1st Cir. 1997) ("an 'unusual standard'"); *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 839 (3d Cir. 1999) (an "unconventional" standard); *Smith v. Ricks*, 31 F.3d 1478, 1485 (9th Cir. 1994) ("'a somewhat unusual standard'"); *Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994) ("an unusual summary judgment standard"); *Rogers v. Columbia/HCA of Central Louisiana*, 971 F. Supp. 229, 234 (W.D. La. 1997) ("an 'unusual' summary judgment standard"); *Sokol v. Akron Gen. Medical Ctr.*, No. 5:95CV1108, 1997 U.S. Dist. LEXIS 22078, at *19 (N.D. Ohio Sept. 30, 1997) ("an unusual standard").

The Eighth Circuit, while stating it intended to be "guided by the substantive evidentiary standards that apply to the case," concluded the "statutory presumption [under HCQIA] included in section 11112(a) add[ed] a rather **unconventional twist to the burden of proof** in [its] summary judgment standard of review." *See* App. at 11a (emphasis added). The Eighth Circuit and the Courts of Appeals it follows are wrong. There is no "twist" or shift in the burden of proof merely because an action involves HCQIA. This Court has made clear "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter," *see Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986) and that "the nonmoving party's evidence 'is to be **believed**, and **all justifiable inferences** are to be drawn in that party's favor'," *See, Hunt v. Cromartie*, 526 U.S. ____, 119 S. Ct. 1545, 1551-52 (1999) (emphasis added). The Eighth Circuit did not apply that standard here.

This Court has further explained that a statutory "rebuttable presumption" in favor of a defendant carries with it "no procedural consequence." *See Lavine v. Milne*, 424 U.S. 577, 584 (1976). On the other hand, this Court has recognized the outcome of litigation can hinge on which party bears the "burden of proof":

> The [rebuttable presumption] provision carries with it no procedural consequence; it shifts . . . neither the burden of going forward nor the burden of proof, for he [i.e. plaintiff] appears to carry the burden from the outset.
>
> * * *
>
> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation.

Id. at 584-85.

The Eighth Circuit in this case, like a majority of the Courts of Appeals, erred in imposing an "unconventional twist to the burden of proof in [the] summary judgment standard of review" under HCQIA. *See* App. at 11a. HCQIA's rebuttable presumption "carrie[d] with it no procedural consequence." *See Lavine v. Milne*, 424 U.S. at 584.

In responding to St. Marys' motion for summary judgment, Dr. Sugarbaker was required only "to make a showing sufficient to establish the existence of an element essential to **[his] case** and on which [**he**] will bear the burden of proof at trial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added). HCQIA is not an essential element to Dr. Sugarbaker's case. HCQIA immunity is an affirmative defense. While HCQIA provides a rebuttable

presumption, St. Marys, not Dr. Sugarbaker, ultimately bears the burden of proof at trial on this issue. A statutory rebuttable presumption under HCQIA simply did not authorize, as the Eighth Circuit did here, a judicial realignment of the burden of proof for summary judgment purposes.

In the first place, summary judgment does not involve an evaluation of the quantum of evidence necessary for the nonmoving party to "carry" any "burden of proof" he may have. Summary judgment requires an examination only of the nonmoving party's "written showing" against the evidence proffered by (or a rebuttable presumption in favor of) the moving party; it is not a measurement of the proffered evidence against a "burden of proof."

Because a statutory rebuttable presumption does not "carr[y] with it [any] procedural consequence" to the burden of proof, the Eighth Circuit erred in effectively realigning the burden of proof to Dr. Sugarbaker by applying an "unconventional twist." As this Court held in *Lavine,* this error by the Eighth Circuit cannot be assumed to be "without consequence." *See Lavine,* 424 U.S. at 585.

This Court previously found it necessary to grant certiorari to correct a similar misapplication of the standard of review for summary judgment made by the Courts of Appeals. *See, e.g., Celotex Corp.* 477 U.S. at, 322 ("[T]he position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) . . . ."); *see also Anderson*, 477 U.S. at 257 ("[T]he Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment . . . ."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 575 (1986) (same).

Following a majority of the Courts of Appeals, the Eighth Circuit has misapplied the burden of proof for

summary judgment in HCQIA cases. The Court should grant Dr. Sugarbaker's petition for writ of certiorari.

III. THE EIGHTH CIRCUIT, IN CONFLICT WITH THE TENTH CIRCUIT, ERRED IN FAILING TO GIVE ANY EVIDENTIARY WEIGHT TO EXPERT TESTIMONY PROFFERRED BY DR. SUGARBAKER.

A. The Courts of Appeals Are in Conflict.

The United States Court of Appeals for the Tenth Circuit has held that medical expert witness testimony submitted by a plaintiff is sufficient evidence to overcome the statutory presumption under HCQIA and to raise a genuine issue of material fact. *See Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 (10th Cir. 1996). A dissent in the Ninth Circuit has expressed a similar view. *Austin v. McNamara*, 979 F.2d 728, 742 (9th Cir. 1992) (Pregerson, J., dissenting) ("The district court and the majority are saying in effect that a jury could *not* reasonably arrive at the same conclusion reached by [a hospital committee], namely that the suspension of [plaintiff's] hospital privileges was unreasonable"(emphasis in original)).[4]

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[4] St. Marys previously has recognized the Tenth Circuit's decision in *Brown* creates a divergence of authority in the Courts of Appeals. *See Reply Brief of Appellant SSM Healthcare Central Region d/b/a St. Marys Health Center* at 16-17 (8th Cir. Jan. 12, 1999) ("The only HCQIA decision cited by Dr. Sugarbaker as contrary authority, [*Brown*] conflicts with HCQIA [] . . . *Brown* impermissibly allows a jury to revisit the substantive decision made by the hospital's governing board and to reweigh the evidence regarding the restriction or termination of staff privileges.").

The majority of Courts of Appeals, including the Eighth Circuit here, have declared "irrelevant" the evidence considered probative by the Tenth Circuit in *Brown*. *See* App. at 15a ("[T]he affidavit of . . . an independent surgeon [regarding] the quality of Dr. Sugarbaker's care . . . is irrelevant to our objective inquiry."); *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 636 n.9 (3d Cir. 1996) ("While the conflicting [expert] reports raise an issue of fact as to whether [plaintiff] provided acceptable care, they do not call into question whether the [hospital's] decision . . . was reasonable."); *Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026, 1030 (4th Cir. 1994) ("[E]ven if [plaintiff] could show that [the peer reviewers] reached an incorrect conclusion . . . that does not meet the burden of contradicting the existence of a reasonable belief . . . ."); *see also Egan v. Athol Memorial Hosp.*, 971 F. Supp. 37, 43 (D. Mass. 1997), aff'd 134 F.3d 361 (1st Cir. 1998) ("The opinions of [plaintiff's] experts are to no avail because even if [plaintiff] could show that defendants reached an incorrect conclusion . . . that does not meet the burden of contradicting the existence of a reasonable belief . . . .").

In *Brown*, the Tenth Circuit explicitly rejected the defendant's argument that a "difference of opinion among [medical] experts does not raise an issue as to the objective reasonableness of the inquiry." *See Brown*, 101 F.3d at 1334 n.9 The Tenth Circuit further held evidence adduced from plaintiff's medical expert (i.e., Dr. Lindley) that a peer review panel's determination was "unreasonable" was sufficient to overcome the statutorily rebuttable presumption under HCQIA, notwithstanding that "a number of doctors . . . testified the review panel's action satisfied the requirements" of HCQIA. *See id.* at 1333-34 n.9.

Dr. Sugarbaker produced more than sufficient evidence to defeat summary judgment under the standard applied by the Tenth Circuit in *Brown*. Indeed, the physician in *Brown* offered expert testimony only from an outside expert retained during litigation (Dr. Lindley) while Dr. Sugarbaker offered testimony from an expert witness involved in the peer review process at St. Marys as well as a medical expert retained after litigation commenced. Both experts are Missouri general surgeons and neither is a friend nor business associate of Dr. Sugarbaker. Each testified that no objectively "reasonable medical practitioner" could have voted to impose the restrictions placed upon Dr. Sugarbaker by St. Marys (2608-10, 2884-85).

Because there is a split in the Courts of Appeals regarding the quantum of evidence and burden of proof under HCQIA, this Court should grant Dr. Sugarbaker's petition for certiorari to resolve the conflict.[5]

B. Lower Courts Are Failing To Follow This Court's Decision in *Patrick*.

In adopting HCQIA, Congress made clear the physician's claim reviewed by this Court in *Patrick v. Burget*,

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[5] Subsumed within the specific questions presented here are subsidiary issues each worthy of consideration. Specifically, in light of the devastating impact of a Data Bank's report upon a physician's career, did the Eighth Circuit, following other Courts of Appeals (excluding the Tenth Circuit), err in holding that "'incorrect conclusion[s] on ... medical issue[s]'" made by St. Marys peer reviewers were irrelevant under HCQIA? *See* App. at 15a. Similiarly, did the Eighth Circuit, following other Courts of Appeals, err in holding the "subjective bias or bad faith motives" of St. Marys peer reviewers (as opposed to St. Marys itself) was "irrelevant" for all purposes under HCQIA? *Id.*. This Court should answer these subsumed questions in the affirmative.

486 U.S. 94 (1988), *rev'g*, 800 F.2d 1498 (9th Cir. 1986), was not the type of claim HCQIA intended to prevent. *See id.* at 98; H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6391. The facts in *Patrick* are strikingly similar to those here.

In *Patrick*, a physician (Dr. Patrick) was a "general and vascular surgeon" who "began an independent practice" in Astoria, Oregon "in competition with the surgical practice" of a large local physician group known as the Astoria Clinic, after declining the offer of the Clinic "to become a partner." 486 U.S. at 96. A few years later, at the urging of a Clinic physician, "the executive committee of the [hospital's] medical staff initiated a review of [Dr. Patrick's] hospital privileges." 486 U.S. at 97. The executive committee "voted to recommend termination of [Dr. Patrick's] privileges on the ground that [Dr. Patrick's] care of his patients was below the standards of the hospital." 486 U.S. at 97. The charges against Dr. Patrick "originally encompassed 21 cases" but "nine cases . . . eventually comprised the evidence" against him. 800 F.2d at 1504. The hospital proffered evidence that doctors were "reluctan[t] to deal with [Dr.] Patrick . . . due to his contentiousness and lack of skill" and the evidence ultimately showed medical experts "disagreed as to the magnitude of [Dr.] Patrick's errors in the nine cases." 800 F.2d at 1502, 1504. Dr. Patrick, "convinced that the outcome was pre-ordained, and reluctant to allow the revocation of hospital privileges to appear on his record, resigned from the hospital." *Id.* During the "course of the hospital peer review proceedings," Dr. Patrick filed a lawsuit for violation of the antitrust laws. 486 U.S. at 97.

The facts here are virtually indistinguishable from *Patrick*. Dr. Sugarbaker declined the offer of the powerful and well-connected JCMG clinic and shortly thereafter was accused not of incompetence but of failing to meet the

unwritten and previously unannounced standards of medical care "at St. Marys," a hospital financially tied to JCMG. The action taken by St. Marys, while initially involving 18 separate patients and 10 types of procedures, most of which concerned breast biopsies, ultimately concerned six cases, none of which were breast biopsies.

Even more compelling than the evidence in *Patrick*, however, the Ad Hoc Committee here during the peer review proceedings unanimously concluded the disciplinary action taken against Dr. Sugarbaker by St. Marys should be "ended." Other evidence offered by Dr. Sugarbaker showed several general surgeons, during and following the peer review proceedings, concluded the action taken by St. Marys was without an objectively reasonable basis.[6]

The Courts of Appeals, including the Eighth Circuit, have uniformly failed to recognize and follow this Court's decision in *Patrick* despite Congressional intent in HCQIA

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[6] The Eighth Circuit's interpretation of the Ad Hoc Committee's findings is a good illustration of its failure to resolve all factual inferences in the light most favorable to Dr. Sugarbaker. Dr. Sugarbaker bore the burden of proving St. Marys' action was "arbitrary, capricious and/or lacking in any factual basis" (R. 2640, 3380-81, 3145). St. Marys' disciplinary action would have been upheld unless Dr. Sugarbaker offered **compelling** contrary evidence. He did. According to the Chair, Dr. Sugarbaker's presentation was "thorough and complete and impressive" (R. 3380). In its report, however, the Ad Hoc Committee noted that St. Marys' failure to provide the factual basis for the original disciplinary action was of "controlling significance" (R. 3419). Because St. Marys' "initial concerns" did not survive scrutiny in the peer review process, and in light of Dr. Sugarbaker's convincing presentation to the Ad Hoc Committee, St. Marys' failure to produce the factual basis for its action should have been viewed suspiciously, not positively, by the Eighth Circuit. The Eighth Circuit improperly concluded "the Ad Hoc Committee's determination did not vindicate Dr. Sugarbaker in the medical sense." *See* App. at 14a.

that they do so. This Court should grant Dr. Sugarbaker's petition for writ of certiorari.

CONCLUSION

The majority of Courts of Appeals, including the Eighth Circuit, have used an Act of Congress (HCQIA) to improperly modify the strictures of Fed. R. Civ. P. 56 to include an "unconventional" and "unusual" burden of proof and standard of review for summary judgment. Only this Court can set the law straight. The Eighth Circuit, following other Courts of Appeals but in conflict with the Tenth Circuit, also has improperly declared testimony of experts to be irrelevant for summary judgment under HCQIA and not applied this Court's decision in *Patrick* as Congress envisioned. Dr. Sugarbaker respectfully requests this Honorable Court grant his petition for writ of certiorari.

Respectfully submitted,
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Nos. 98-2742, 98-2743

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stephen P. Sugarbaker, M.D.,
Appellant/Cross-Appellee,

v.

SSM Health Care, d/b/a St. Marys Health Center,
Cross-Appellant/Appellee.

April 19, 1999, Submitted

August 19, 1999, Filed

COUNSEL:
Counsel who presented argument on behalf of the appellant was Bartholomew Lawrence McLeay of Omaha, Nebraska. In addition the names of Richard P. Jeffries of Omaha, Nebraska, and Gregory Hancks of Kansas City, Misosuri, appear on the brief of the appellant.

Counsel who presented argument on behalf of the appellee was David Harris of St. Louis, Missouri. In addition the names of John E. Petite, Dawn Morville Johnson and Crolyn Bernstein of St. Louis, Missouri, appear on the brief of the appellee.

JUDGES:

Before BEAM and HANSEN, Circuit Judges, and KOPF,[1] District Judge.

OPINIONBY:
HANSEN

OPINION:

HANSEN, Circuit Judge.
St. Marys Health Center (St. Marys) restricted and then terminated the staff privileges of Dr. Stephen P. Sugarbaker. In response, Dr. Sugarbaker filed suit alleging that St. Marys' actions violated federal antitrust laws, as well as various Missouri state laws. The district court[2] granted summary judgment in favor of St. Marys on the basis of immunity under the Health Care Quality Improvement Act of 1986 (HCQIA). See *42 U.S.C. § § 11111*(a)(1), 11112(a) (1994). Dr. Sugarbaker appeals, and we affirm. Because we affirm the district court's judgment regarding immunity under the HCQIA, we do not reach St. Marys' cross-appeal challenging the district court's denial of St. Marys' motions to dismiss Dr. Sugarbaker's suit.

I. Background

Dr. Stephen Sugarbaker is a general surgeon who practiced in Jefferson City, Missouri. SSM Health Care (SSM) owns and operates St. Marys Health Center in Jefferson City. In 1994, Dr. Sugarbaker obtained provisional medical staff privileges at St. Marys. St. Marys suspended Dr. Sugarbaker's privileges in 1995, and it eventually

terminated his privileges in 1997. Dr. Sugarbaker contends that he was the victim of a conspiracy to control the market for medical services in the Jefferson City area. Specifically, Dr. Sugarbaker contends that because he refused to join the Jefferson City Medical Group (JCMG), members of that group conspired with persons at St. Marys to terminate Dr. Sugarbaker's medical staff privileges.

The dispute between Dr. Sugarbaker and St. Marys began in early 1995. At that time, Mike Wilfawn, St. Marys' Department Manager for Surgical Services, and Gay Cunningham, the Vice President of Patient Services, notified Dr. John Koonce, the Surgery Department Chairman, of staff concerns regarding Dr. Sugarbaker. Dr. Koonce forwarded the concerns to St. Marys' Medical Executive Committee (Executive Committee) and requested a full review of Dr. Sugarbaker's cases. The Executive Committee is responsible for providing recommendations to the SSM Board of Directors regarding medical staff privileges. On May 1, 1995, St. Marys informed Dr. Sugarbaker of its concerns. Dr. Sugarbaker agreed to a full retrospective review and concurrent monitoring of his cases.

On June 19, 1995, after four surgeons had reviewed some 24 of Dr. Sugarbaker's cases, St. Marys' Surgery Review Committee met to discuss Dr. Sugarbaker's situation. The reviewing surgeons found evidence of the following: (1) delay in initiating an operation; (2) excessive surgery times in some cases; (3) excessive blood loss; (4) questionable use of antibiotics; and (5) excessive tissue removal in breast biopsies. In view of these health care quality concerns, the Surgery Review Committee recommended a precautionary summary suspension of Dr. Sugarbaker's clinical privileges. After Dr. Sugarbaker refused to request a voluntary leave of absence, the Executive Committee imposed the precautionary

suspension, and on August 3, 1995, the Executive Committee voted to continue the precautionary suspension. On August 7, St. Marys provided Dr. Sugarbaker with a detailed listing of the Surgery Review Committee's case review findings. St. Marys also informed Dr. Sugarbaker of his right to request a hearing.

Dr. Sugarbaker requested a hearing, and the Executive Committee appointed an Ad Hoc Committee of independent physicians, including two general surgeons, to review the Executive Committee's concerns. The Ad Hoc Committee held a hearing on November 6, 1995, and permitted Dr. Sugarbaker to present evidence and expert testimony, and to cross-examine the Executive Committee's representative. Thereafter, the Ad Hoc Committee unanimously voted to remove the precautionary suspension due to a lack of information. The Ad Hoc Committee indicated that it had only received information concerning the procedures followed, not the factual basis for the conclusions reached by the Surgery Department.

Notwithstanding the Ad Hoc Committee's recommendation to remove the suspension due to a lack of information, the Executive Committee determined that four areas of concern remained, and it decided to send these issues back to an Ad Hoc Committee for further consideration. Dr. Sugarbaker, however, requested that the additional hearing be directly before the Executive Committee, rather than before an Ad Hoc Committee. n3 On January 24, 1996, the Executive Committee held a six-hour factfinding hearing. Dr. Sugarbaker was again permitted to present evidence on his own behalf, to respond to questions, and to cross-examine adverse witnesses. After this hearing, the Executive Committee voted to permanently terminate Dr. Sugarbaker's privileges. In a letter dated February 1, 1996, St. Marys

notified Dr. Sugarbaker of the Executive Committee's decision. The letter stated that the Executive Committee based its decision on Dr. Sugarbaker's "lack of clinical judgment, technical ability, and ethical perspective in performance of clinical privileges." (J.A. at 760.) The letter also informed Dr. Sugarbaker of his right to an appeal and enclosed copies of the relevant sections of the Medical Staff Bylaws.

Dr. Sugarbaker appealed the Executive Committee's decision. The SSM Board appointed an Appellate Review Committee comprised of two SSM Board members and one SSM administrator. According to the Medical Staff Bylaws, the Appellate Review Committee reviews the hearing record and any statements submitted ... to determine whether the adverse Recommendation or decision was justified and was not arbitrary or capricious." (Id. at 240.) Contrary to the Executive Committee's views, the Appellate Review Committee recommended that Dr. Sugarbaker be provisionally reinstated for one year, that Dr. Sugarbaker be prohibited from performing emergency/trauma surgery, that he be supervised during certain types of surgery, and that all of his cases be subject to review and monitoring. (See id. at 982-83.) The Appellate Review Committee also found that "the Executive Committee did not act in an arbitrary or capricious manner," and that there was no "conspiracy" to oust Dr. Sugarbaker. (Id. at 984.) The Appellate Review Committee expressed a concern that the Executive Committee had not sufficiently articulated what it believed to be the standard of care in each case, but it concluded that the Executive Committee had "identified some very clear deficiencies on Dr. Sugarbaker's part," and that "sufficient

evidence exists to raise concerns about Dr. Sugarbaker's practice." (Id. at 984-85.)

The Appellate Review Committee enumerated four specific deficiencies with regard to Dr. Sugarbaker's practice. First, the committee expressed concern for the amount of time Dr. Sugarbaker required to perform laparoscopic cholecystectomies. n4 The committee noted that despite Dr. Sugarbaker's inexperience in performing such operations independently, he failed to request assistance in the performance of these procedures. The Appellate Review Committee's second concern related to a neck trauma case in which the patient experienced an airway obstruction. The committee concluded that irrespective of the various possible reasons why the patient experienced the obstruction, "Dr. Sugarbaker's delay in securing the patient's airway, and, by the accounts of all witnesses present, the further delay in responding to a life and death crisis, exhibits an inability to respond appropriately in crisis situations." (J.A. at 985.) Third, the Appellate Review Committee noted that it was "unconvinced by Dr. Sugarbaker's varying explanations as to why [a patient] experienced [a] mid-procedure crisis and why Dr. Sugarbaker failed to document the event." (Id.) Finally, the committee expressed concerns for Dr. Sugarbaker's apparent lack of "self-awareness." (Id.) According to the Appellate Review Committee:

[Dr. Sugarbaker's] lack of self-awareness precludes him from being self-critical about his surgical skills, which interferes with his abilities to improve in certain areas, seek appropriate assistance, or decline to perform some procedures or in some contexts, such as trauma. This perceived lack of self-awareness is consistent with the Executive Committee's concerns about Dr. Sugarbaker's judgement [sic].

(Id.)

In view of the Appellate Review Committee's decision to provisionally reinstate Dr. Sugarbaker for one year, the SSM Board voted to modify in part, and to reverse in part, the Executive Committee's recommendation to permanently suspend Dr. Sugarbaker's privileges. According to the Bylaws, when the Board's decision is contrary to the Executive Committee's recommendation, the Executive Committee may request a Joint Conference Committee to review the matter. The Joint Conference Committee is comprised of three members of the SSM Board and three members of the Executive Committee. In this case, the Joint Conference Committee essentially followed the Appellate Review Committee's decision and recommended that Dr. Sugarbaker be reappointed to the provisional staff for one year, subject to a host of substantial restrictions and conditions. The SSM Board followed the recommendations of the Appellate Review Committee and the Joint Conference Committee. Dr. Sugarbaker was eventually terminated for failing to abide by the restrictions and conditions attached to his provisional reappointment.

In accordance with Missouri law, see Mo. Ann. Stat. § 383.133 (1991), St. Marys reported its final action to the Missouri State Board of Registration for the Healing Arts. On the National Practitioner Data Bank adverse action report, St. Marys selected an "Adverse Action Classification Code" corresponding to incompetence / malpractice / negligence.

Dr. Sugarbaker filed suit against St. Marys in August 1997, alleging violations of the Sherman Act, breach of contract, tortious interference with a business expectancy, intentional and negligent infliction of emotional distress, and libel. St.

Marys moved to dismiss the complaint. The district court denied St. Marys' motion to dismiss and refused to certify its decision for an immediate appeal pursuant to *28 U.S.C. § 1292*(b). After Dr. Sugarbaker amended his complaint, St. Marys filed a second motion to dismiss which the district court likewise denied. St. Marys also filed a motion for summary judgment on the basis of immunity under the HCQIA. The district court denied this motion as being premature. After the close of discovery, St. Marys filed a second HCQIA-based summary judgment motion. St. Marys also filed a motion for summary judgment on the merits of Dr. Sugarbaker's claims. The district court granted St. Marys' motion for HCQIA immunity and denied as moot St. Marys' motion for summary judgment on the merits.

Dr. Sugarbaker appeals the district court's judgment granting St. Marys immunity under the HCQIA. St. Marys cross-appeals the district court's denial of its motions to dismiss.

II. The Summary Judgment Record

Dr. Sugarbaker first argues that the district court considered unauthenticated documents in ruling on St. Marys' HCQIA summary judgment motion. Therefore, according to Dr. Sugarbaker, summary judgment was improperly granted. We disagree.

St. Marys' first HCQIA summary judgment motion included an affidavit authenticating the peer review record that was attached to the motion. (See J.A. at 1122-23.) Dr. Sugarbaker has not identified to this court what evidence, if any, in the proffered peer review record changed between St. Marys' first and second HCQIA motions. Even assuming that the peer

review record submitted with St. Marys' second HCQIA motion included unauthenticated material in addition to the previously authenticated material, Dr. Sugarbaker has failed to show how the district court's reliance on such material was other than harmless error. See *Dautremont v. Broadlawns Hosp., 827 F.2d 291, 295 (8th Cir. 1987)* (requiring a plaintiff to show he was prejudiced by a district court's reliance on unauthenticated documents). In his reply brief, Dr. Sugarbaker suggests that he has demonstrated the unreliability and falseness of St. Marys' exhibits. (See Appellant's Reply Br. at 6 (citing J.A. at 2583 n.3, 2587-88).) We have carefully reviewed the cited passages and conclude that while these passages arguably reflect Dr. Sugarbaker's general displeasure with the peer review record, they fall far short of calling into question the authenticity or reliability of any particular document or exhibit. Therefore, we hold that the district court did not improperly grant summary judgment on the basis of an unauthenticated record. Out of an abundance of caution, however, we have attempted to confine our review to those portions of the record that were submitted and authenticated with St. Marys' first HCQIA motion.

III. HCQIA Immunity

"Congress passed the [HCQIA] 'to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior.'" *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 632 (3d Cir. 1996)* (quoting H.R. Rep. No. 903, 99th Cong., 2d Sess. 2 (1986)). Congress believed that effective peer review would be furthered "by granting limited immunity from suits for money damages to participants in professional peer review actions." Id. (citing *42 U.S.C. § § 11101*(5), 11111(a)).

The HCQIA defines the term "professional review action" to mean

an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges ... of the physician.

42 U.S.C. § 11151(9). See also *Mathews, 87 F.3d at 634* (noting that the term "'professional review action' encompasses decisions or recommendations by peer review bodies that directly curtail a physician's clinical privileges or impose some lesser sanction that may eventually affect a physician's privileges").

In order for there to be immunity under the HCQIA, the professional review action must be taken:

(1) in the reasonable belief that the action was in furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a). See also *Wayne v. Genesis Med. Ctr., 140 F.3d 1145, 1148 (8th Cir. 1998)*. The HCQIA further creates a presumption that a professional review action meets these standards "unless the presumption is rebutted by a preponderance of the evidence." *Wayne, 140 F.3d at 1148* (citing *42 U.S.C. § 11112*(a)). Hence, Dr. Sugarbaker must rebut the statutory presumption that St. Marys' actions comply with the HCQIA's standards. Further, we have held that the reasonableness requirements contained in section 11112(a) necessitate an objective inquiry. See id. (citing other circuits that have applied an objective standard).

It is well settled that we review the grant of summary judgment de novo, and we apply the same standards as the district court. See *Wayne, 140 F.3d at 1147*. The statutory presumption included in section 11112(a) adds a rather unconventional twist to the burden of proof in our summary judgment standard of review, but "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Therefore, like the district court, we must ask, "Might a reasonable jury, viewing the facts in the best light for [Dr. Sugarbaker], conclude that he has shown, by a preponderance of the evidence, that [St. Marys'] actions are outside the scope of § 11112(a)?" *Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992)*. Stated differently, we must determine whether "[Dr. Sugarbaker] 'satisfied his burden of producing evidence that would allow a reasonable jury to conclude that [St. Marys'] peer review disciplinary process failed to meet the standards of HCQIA.'" *Brader v. Allegheny Gen. Hosp., 167 F.3d 832, 839 (3d Cir. 1999)* (quoting *Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1334 (11th Cir.*

1994), cert. denied, *514 U.S. 1019, 131 L. Ed. 2d 220, 115 S. Ct. 1363 (1995))*.

A. The Restriction of Dr. Sugarbaker's Privileges

Dr. Sugarbaker argues that St. Marys is not entitled to immunity because it did not satisfy the objective standards of section 11112(a). We address each of the requirements for immunity in order. It is important to reiterate that St. Marys is presumed to have complied with the standards, and Dr. Sugarbaker bears the burden of rebutting that presumption by a preponderance of the evidence.

1. Reasonable Belief that the Action Furthered Quality Health Care -- Section 11112(a)(1)

The first inquiry is whether the professional review action was taken "in the reasonable belief that the action was in the furtherance of quality health care." *42 U.S.C. § 11112*(a)(1). Dr. Sugarbaker presents a host of arguments in his attempt to rebut the statutory presumption of reasonableness that attaches to St. Marys' actions. He first asserts that only one of the initial grounds used to justify the precautionary suspension--the excess surgery times--survived to justify St. Marys' ultimate decision to restrict his privileges. He further points to expert testimony suggesting that the peer reviewers' concerns regarding excess surgery times were not worthy of serious consideration. Therefore, according to Dr. Sugarbaker, there was no objectively reasonable basis for imposing or continuing the original precautionary summary suspension.

These assertions, even when fully credited, miss the mark. The focus of our inquiry is not whether the Executive Committee's initial concerns ultimately proved to be medically sound. Rather, our objective inquiry focuses on

whether the professional action taken against Dr. Sugarbaker was taken "in the reasonable belief that the action was in the furtherance of quality health care." *42 U.S.C. § 11112*(a)(1).

The Executive Committee initiated the peer review process after receiving complaints regarding Dr. Sugarbaker's practice. It is undisputed that St. Marys imposed the precautionary suspension only after further investigation revealed objective medical concerns regarding: (1) delay in initiating an operation; (2) excessive surgical times; (3) excessive blood loss; (4) questionable use of antibiotics; and (5) excess tissue removal in breast biopsies.

In fact, the record in this case includes ample evidence that concerns for quality health care remained throughout the peer review process. For example, the Appellate Review Committee enumerated specific concerns regarding Dr. Sugarbaker's practice. With respect to Dr. Sugarbaker's long operating times in performing laparoscopic cholecystectomies, the Appellate Review Committee's decision demonstrates that its concerns encompassed more than the economic aspect of the excessive operating times. In particular, the Appellate Review Committee concluded that the excessive operating times were attributable to Dr. Sugarbaker's inexperience with the procedure, and it expressed concern that Dr. Sugarbaker failed to request any assistance in performing these procedures despite his inexperience. (See J.A. at 985.) The Appellate Review Committee further concluded that Dr. Sugarbaker had exhibited "an inability to respond appropriately in crisis situations." (Id.) Finally, the Appellate Review Committee concluded that Dr. Sugarbaker demonstrated "a lack of self-awareness" that "precluded him from being self-critical about his surgical skills, which interferes with his abilities to

improve in certain areas, seek appropriate assistance, or decline to perform some procedures or in some contexts, such as trauma." (Id.)

The Board's final decision restricting Dr. Sugarbaker's privileges and prohibiting him from performing trauma surgery, emergency surgery, and laparoscopic cholecystectomies is entirely consistent with the Appellate Review Committee's conclusions. (See id. at 1008.) Thus, it is clear that concerns for health care quality remained at the forefront throughout the peer review process. The fact that some of the specific concerns shifted or changed over time does not rebut the presumption that St. Marys restricted Dr. Sugarbaker's privileges "in the reasonable belief that the action was in the furtherance of quality health care." *42 U.S.C. § 11112* (a)(1).

Dr. Sugarbaker also argues that because the Ad Hoc Committee recommended that the precautionary suspension be lifted, there was no objectively reasonable basis for continuing the suspension. This argument ignores the stated basis for the Ad Hoc Committee's recommendation. The Ad Hoc Committee expressly stated that its recommendation favoring Dr. Sugarbaker hinged on a lack of relevant information regarding the reasons underlying the precautionary suspension. (See Appellant's Adden. at 28.) Consequently, the Ad Hoc Committee's recommendation did not vindicate Dr. Sugarbaker in the medical sense. In fact, the Ad Hoc Committee's recommendation did not specifically address any of the health care quality issues underlying the precautionary suspension.

Dr. Sugarbaker next argues that the Executive Committee's determinations were not objectively reasonable because

several members of that committee were allegedly Dr. Sugarbaker's economic competitors. Dr. Sugarbaker, however, waived this issue by failing to lodge a timely objection to the participation of any particular Executive Committee member, n5 See *Bryan, 33 F.3d at 1336.* Cf. *Mathews, 87 F.3d at 637* (noting that "the Act contains no provision barring competitors from participating in 'professional review activities'").

Next, Dr. Sugarbaker points to the affidavit of Dr. Carl Doerhoff, an independent surgeon, which stated that the peer reviewers could not have entertained doubts as to the quality of Dr. Sugarbaker's care. This evidence, however, is irrelevant to our objective inquiry. Our focus is on the reasonableness of the peer reviewer's belief that they were furthering quality health care. "The Act does not require that the professional review result in an actual improvement of the quality of health care." *Imperial v. Suburban Hosp. Ass'n, Inc., 37 F.3d 1026, 1030 (4th Cir. 1994).* "[Dr. Sugarbaker's] showing 'that [the] doctors reached an incorrect conclusion on a particular medical issue because of a lack of understanding' does not 'meet the burden of contradicting the existence of a reasonable belief that they were furthering health care quality....'" *Brader, 167 F.3d at 843* (quoting *Imperial, 37 F.3d at 1030).*

Finally, to the extent Dr. Sugarbaker's case relies on inferences of a conspiracy to oust him, we conclude that such inferences do not create any genuine issues of fact in this case. In the HCQIA immunity context, the circuits that have considered the issue all agree that the subjective bias or bad faith motives of the peer reviewers is irrelevant. See, e.g., *Brader, 167 F.3d at 840; Mathews, 87 F.3d at 635; Bryan, 33 F.3d at 1335; Austin, 979 F.2d at 734.* We agree with the

views of our sister circuits and now hold that bad faith on the part of the reviewers is irrelevant to the objective inquiry under *42 U.S.C. § 11112*(a). Moreover, Dr. Sugarbaker has produced no hard evidence of any conspiracy, and the Appellate Review Committee concluded that no such conspiracy existed. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* (noting that a plaintiff may not rest on mere allegations to withstand a motion for summary judgment).

In sum, Dr. Sugarbaker failed to produce sufficient relevant evidence to rebut the presumption that St. Marys restricted his privileges in the reasonable belief that the action was in furtherance of health care quality. St. Marys could have reasonably concluded that by taking action, it was safeguarding and furthering the health care interests of its patients.

2. Reasonable Fact Gathering -- Section 11112(a)(2)

In order to qualify for HCQIA immunity, St. Marys must have made a reasonable effort to obtain the relevant facts. See *42 U.S.C. § 11112*(a)(2). In assessing this issue, we consider "whether the totality of the process leading up to the Board's 'professional review action' ... [evinces] a reasonable effort to obtain the facts of the matter." *Mathews, 87 F.3d at 637.* See also *Brader, 167 F.3d at 841.*

St. Marys subjected its concerns regarding Dr. Sugarbaker to an exhaustive review process, including expert retrospective reviews and multiple fact-finding hearings during which Dr. Sugarbaker was permitted extensive trial-type rights. Moreover, St. Marys conducted an exhaustive appellate-level

review during which Dr. Sugarbaker was again given extensive rights.

Notwithstanding the processes employed by St. Marys, Dr. Sugarbaker argues that certain alleged deficiencies undermine the reasonableness of the fact gathering process in his case. We have carefully reviewed Dr. Sugarbaker's arguments and the record, and we find no merit in any of his contentions. We agree with the view expressed by the district court; "if [St. Marys] did nothing else, it undertook a thorough investigation of the facts." (Appellant's Adden. at 9.)

3. Adequate Notice and Hearing Procedures -- Section 11112(a)(3)

The failure to provide a physician with adequate notice and fair procedures precludes immunity under the HCQIA. See *42 U.S.C. § 11112*(a)(3). Dr. Sugarbaker asserts that evidence of alleged bias, ex parte communications, insufficient notice of issues, and an inadequate investigation rebut the presumption that St. Marys provided adequate notice and due process in this case. Dr. Sugarbaker's arguments in this regard are largely disjointed, conclusory, and sometimes confusing. He waived his complaint that bias tainted his hearing before the Executive Committee by failing to make "contemporaneous objections to the manner in which the hearing procedures were conducted." *Bryan, 33 F.3d at 1336.* Further, his assertion that an insufficient investigation resulted in an unfair hearing is, as demonstrated above, unsupported by any substantive analysis.
Dr. Sugarbaker argues that an alleged "shared counsel" arrangement between the Appellate Review Committee and the Executive Committee could reasonably be viewed as allowing improper ex parte contacts that undermined the

fairness of the hearing procedures in his case. Kathleen Boozang represented the Appellate Review Committee. Ms. Boozang is a law professor at Seton Hall University School of Law. She is also "of counsel" with the same law firm, Greensfelder, Hemker & Gale, P.C., that represented St. Marys throughout the peer review process and this lawsuit. At the Appellate Review Committee hearing, Ms. Boozang introduced herself and her affiliation with the Greensfelder firm, but Dr. Sugarbaker failed to object to her participation until well after the hearing. Consequently, even if we assume that Ms. Boozang's participation was improper, it appears that Dr. Sugarbaker has waived this issue. See *Bryan, 33 F.3d at 1336.* In view of Dr. Sugarbaker's failure to timely object to Ms. Boozang's participation, and the fact that St. Marys provided Dr. Sugarbaker with multiple levels of review, we conclude that the potential for ex parte contacts in one phase of the peer review process does not detract from the overall fairness of the procedures employed in this case.[6]

Dr. Sugarbaker also argues that he was afforded insufficient notice of St. Marys' concerns. Specifically, Dr. Sugarbaker contends that he was deprived of "a fair hearing due to the continually changing charges brought against him." (Appellant's Br. at 47.) We disagree. The fact that the peer reviewers' concerns shifted as the investigation continued does not alone undermine the fairness of the procedures employed. During each phase of the peer review process, St. Marys notified Dr. Sugarbaker of his procedural rights under the hospital's bylaws. Before each hearing, St. Marys notified Dr. Sugarbaker of its concerns.

Despite his contention that the changing charges resulted in an unfair hearing, Dr. Sugarbaker points to only one specific instance when he was confronted with a medical

issue for which he was not given specific, prior notice. During the hearing before the Executive Committee, one of the committee members raised concerns regarding patient feeding in a colectomy case. Prior to this time, the peer reviewer's concern with respect to the colectomy case had focused on Dr. Sugarbaker's possibly dangerous delay in initiating the operation. On our review of the record, however, it is clear that the questions posed with respect to patient feeding were logically related to the committee's previously identified concerns. For example, in his defense, Dr. Sugarbaker referred to literature that arguably supported nonoperative management of similar cases with antibiotics and nutrition. (See J.A. at 622.) Dr. Sugarbaker also presented the testimony of an expert witness to support his contention that he managed the case appropriately. (See id. at 642.) A member of the Executive Committee asked this expert about the proper nutritional management of patients in similar circumstances. (See id. at 646.) The expert's response called into question Dr. Sugarbaker's care with respect to feeding this patient. In view of the foregoing, we cannot say that the Executive Committee's concern regarding the patient feeding issue was not so unexpected that it detracted from the fairness of the process employed in this case. In any event, Dr. Sugarbaker had the opportunity to respond to this matter when he presented his case to the Appellate Review Committee. See, e.g., id. at 782.)

In summary, we conclude that Dr. Sugarbaker has failed to present sufficient evidence to rebut the presumption that St. Marys complied with section 11112(a)(3).

4. Reasonable Belief that the Action was Necessary -- Section 11112(a)(4)

The final inquiry under section 11112(a) is whether St. Marys undertook the professional review action "in the

reasonable belief that the action was warranted by the facts known after [a] reasonable effort to obtain facts" and after providing adequate notice and hearing procedures. *42 U.S.C. § 11112*(a)(4). "Our analysis under § 11112(a)(4) closely tracks our analysis under § 11112(a)(1)." *Brader, 167 F.3d at 843.*

Dr. Sugarbaker's arguments regarding this fourth inquiry are brief and conclusory. He contends that the opinions of several independent surgeons rebut the statutory presumption favoring St. Marys, and establish a genuine issue of fact precluding summary judgment. To the extent Dr. Sugarbaker offers expert testimony to cast doubt upon the correctness of the medical determinations underlying St. Marys' actions, such matters are of only marginal relevance to our objective inquiry.

> Although not every panel [involved in the multi-step review process] reached identical conclusions about the necessity of suspending [Dr. Sugarbaker's] privileges, a plaintiffs showing "that [the] doctors reached an incorrect conclusion on a particular medical issue because of a lack of understanding" does not "meet the burden of contradicting the existence of a reasonable belief that they were furthering health care quality in participating in the peer review process."
>
> *Brader, 167 F.3d at 843* (quoting *Imperial, 37 F.3d at 1030).*

Moreover, with respect to any expert opinions Dr. Sugarbaker prepared for litigation in court,[7] those opinions "do not rebut the presumption that the Board made its decision in the reasonable belief that it was warranted by the facts known." *Mathews, 87 F.3d at 638.* The conclusions of

these experts "were not among 'the facts known' at the time of the professional review action." Id.

Dr. Sugarbaker failed to present sufficient evidence to rebut the presumption that St. Marys has complied with the requirements of *42 U.S.C. § 11112*(a)(4).

B. Committee Action Versus Hospital Action

Dr. Sugarbaker argues that even if St. Marys enjoys HCQIA immunity for the Board's decision to restrict his privileges, the statute provides no immunity for the actions of St. Marys' peer review committees. Therefore, according to Dr. Sugarbaker, St. Marys remains vicariously liable for the allegedly improper precautionary summary suspension.

As an initial matter, we reject Dr. Sugarbaker's premise that the precautionary suspension was improper. St. Marys' Medical Staff Bylaws permit the Executive Committee to impose a precautionary summary suspension of "all or a portion of the admitting or clinical privileges of a Practitioner if necessary to the best interests of patient care." (J.A. at 229.) In this case, the Executive Committee imposed the precautionary suspension only after the Surgery Review Committee's review of 24 of Dr. Sugarbaker's surgical cases raised concerns with respect to Dr. Sugarbaker's practice. (See id. at 279, 293.) Furthermore, under the HCQIA's emergency provisions, summary suspensions, "subject to subsequent notice and hearing or other adequate procedures," do not result in the loss of immunity "where the failure to take such an action may result in an imminent danger to the health of any individual." *42 U.S.C. § 11112*(c)(2). In a footnote, Dr. Sugarbaker contends that St. Marys and the

Executive Committee are not entitled to the protections of section 11112(c)(2) because Dr. Sugarbaker had no patients admitted to St. Marys at the time the Executive Committee imposed the precautionary suspension. (See Appellant's Br. at 50 n.10.) We see no reason to limit the HCQIA emergency provisions to situations in which there is a currently identifiable patient whose health may be jeopardized. "The [HCQIA] does not require imminent danger to exist before a summary restraint is imposed. It only requires that the danger may result if the restraint is not imposed." *Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1443 (9th Cir. 1994),* cert. denied, *513 U.S. 1127, 130 L. Ed. 2d 881, 115 S. Ct. 936 (1995).*

We also reject Dr. Sugarbaker's rather tortured interpretation of the HCQIA. Dr. Sugarbaker selectively cites portions of various subsections of the HCQIA to create a patchwork argument that only hospitals, not committees or medical staff, can implement professional review actions, and therefore, HCQIA immunity applies only to actions taken by hospitals and not actions taken by committees. Thus, according to Dr. Sugarbaker, St. Marys cannot qualify for immunity for the actions of the Executive Committee.

Even assuming arguendo that Dr. Sugarbaker has uncovered a statutory anomaly whereby the various definitions contained in the HCQIA do not dovetail perfectly together, we are persuaded that Dr. Sugarbaker's selective reading of the statute cannot stand because it would undermine Congress's clear intent in enacting the statute. When the HCQIA is viewed as a whole, there is no doubt that Congress intended to improve the quality of our nation's health care by encouraging professional self-regulation. See *42 U.S.C. § 11101; Addis v. Holy Cross Health Sys. Corp., 88 F.3d 482,*

485 (7th Cir. 1996) (discussing the HCQIA's package of incentives and disincentives that are designed to further self-regulation in the medical profession). Accepting Dr. Sugarbaker's asserted statutory construction would seriously undermine Congress's intent, if hospitals such as St. Marys could never receive immunity for the actions taken by their peer review committees, there would be a gaping hole in the HCQIA's protective scheme. Such a situation would discourage peer review activities and hamper the medical profession's self-regulation efforts.

C. Summary -- HCQIA Immunity

We hold that Dr. Sugarbaker has failed to satisfy his burden of producing sufficient relevant evidence that would allow a reasonable jury to conclude by a preponderance of the evidence that St. Marys is not entitled to statutory immunity under the HCQIA.

IV. Dr. Sugarbaker's Claim for Injunctive Relief

HCQIA immunity is limited to suits for damages; there is no immunity from suits seeking injunctive or declaratory relief. See *42 U.S.C. § 11111*(a)(1); *Imperial, 37 F.3d at 1031.* Dr. Sugarbaker's first amended complaint included a prayer for injunctive relief that he now contends survived summary judgment. n8 Dr. Sugarbaker argues, therefore, that his claim for injunctive relief survives even if St. Marys is entitled to HCQIA immunity with respect to his damages claims. St. Marys contends, however, that Dr. Sugarbaker has waived or otherwise abandoned his right to seek injunctive relief in this case.

In Imperial, the Fourth Circuit held that because the physician/plaintiff had abandoned his prayer for injunctive relief before the district court, the appeals court would not reinstate the claim. See *37 F.3d at 1031.* The court considered the fact that the physician filed no motion for injunctive relief, and failed to press the issue when "the vitality of the complaint, in its entirety, was put to the test on an immunity defense." Id. In short, the physician "made no overture to the district court to suggest that he had a continuing interest in pursuing injunctive relief which would survive the immunity defense." Id.

Dr. Sugarbaker's case is almost indistinguishable from Imperial in this regard. Dr. Sugarbaker never actively pursued any injunctive relief before the district court. He never moved for an injunction, and after the district court entered its judgment on St. Marys' HCQIA motion, Dr. Sugarbaker did not seek to clarify the status of his prayer for injunctive relief. In short, like the physician in Imperial, Dr. Sugarbaker never indicated to the district court that he had a "continuing interest in pursuing injunctive relief." *Imperial, 37 F.3d at 1031.* Therefore, we hold that Dr. Sugarbaker has abandoned his prayer for injunctive relief.

V. Conclusion

In summary, we hold that the district court did not improperly grant summary judgment on the basis of an unauthenticated record. We further hold that Dr. Sugarbaker failed to present sufficient evidence to rebut the presumption that St. Marys is entitled to immunity under the HCQIA, and that St. Marys is also entitled to immunity for the actions taken by its peer review committees. Finally, we hold that Dr. Sugarbaker has abandoned his prayer for injunctive relief. In

view of our decision on Dr. Sugarbaker's appeal, we do not reach the merits of St. Marys' cross-appeal.
The district court's judgment is affirmed.

Footnotes

[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

[2] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

[3] At the time he elected to proceed directly before the Executive Committee it appears that Dr. Sugarbaker was unaware of the Ad Hoc Committee's recommendation. We note, however, that the Medical Staff Bylaws do not require notification of an Ad Hoc Committee's favorable recommendation. (See J.A. at 226.) Moreover, Dr. Sugarbaker advanced several reasons why a hearing directly before the Executive Committee was preferable see id. at 452), and he had previously objected to the participation of certain members of the Ad Hoc Committee (see id. at 311).

[4] "A laparoscopic cholecystectomy is a ... method of performing gallbladder surgery by use of a laparoscope, which allows the surgeon to see inside the patient and perform the surgery without opening the patient's abdominal cavity." (Appellee's Br. at 16 n.7.)

[5] In his reply brief, Dr. Sugarbaker asserts that he had "repeatedly objected to direct economic competitors who sat on various committees during the peer review process (R.

2197-98)." (Appellant's Reply Br. at 18.) We have carefully reviewed the portions of the record referred to by Dr. Sugarbaker, and we find no indication that Dr. Sugarbaker ever raised a timely objection with respect to the participation of any member of the Executive Committee. He objected to the participation of certain members of the Ad Hoc Committee, the committee he now claims vindicated him.

[6] Dr. Sugarbaker would also be hard pressed to show meaningful prejudice attributable to Ms. Boozang's participation. The Appellate Review Committee rejected the Executive Committee's recommendation that St. Marys completely terminate Dr. Sugarbaker's privileges.

[7] On this issue, Dr. Sugarbaker's brief does not indicate which expert's opinions, if any, were available to the SSM Board or any of the peer review participants. (See Appellant's Br. at 48-49.)

[8] This argument calls into question our jurisdiction to consider these appeals. See *In re Grand Jury Subpoenas Duces Tecum, 85 F.3d 372, 374 (8th Cir. 1996)* ("It is the duty of the Court of Appeals to satisfy itself as to its jurisdiction to consider an appeal....") (internal quotation omitted). If the district court did not dispose of all of Dr. Sugarbaker's claims, there has been no final order, and consequently, there is no appellate jurisdiction. See id.; *28 U.S.C. § 1291* (1994). The district court did not expressly grant summary judgment in favor of St. Marys with respect to Dr. Sugarbaker's claim for injunctive relief. Further, neither the district court's order nor the clerk's judgment expressly states that the court intended to dispose of the

entire case when it granted St. Marys' motion for immunity under the HCQIA. On the other hand, the court denied as moot St. Marys' motion for summary judgment on the merits, and the district court's docket sheet indicates that the court's decision terminated the case. (See J.A. at 14.) Thus, we are satisfied that the district court's order was indeed final, and we have jurisdiction to consider the present appeals.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Stephen P. Sugarbaker, M.D.,
Plaintiffs

v.

SSM Health Care Central Region d/b/a St. Marys Health Center,
Defendant

97-4239-CV-C-SOW

ORDER.

Before this Court is the defendant's Motion for *Sumnmnary* iudgment under the Health Care Quality Improvement Act of 1986 (Doc. #155) and plaintiff's Response to defendant's Motion for Summary Judgment (Doc. #176). For the reasons discussed **below,** the Motion is granted.

I. Background

Plaintiff Dr. Stephen P. Sugarbaker, a general surgeon in Jefferson City, filed suit against defendant St. Marys Hospital alleging various theories of recovery. All of the claims made against the defendant stem from St. Marys' suspension and restriction of the plaintiff's medical staff privileges and the subsequent reporting of those restrictions.

II. Standard

Defendant's current summary judgment motion is premised upon the Health Care Quality Improvement Act ("HCQIA"). See 42 U.SC. §§11101-52. The Eighth Circuit has only recently interpreted the HCQIA. See Wayne v. Genesis Medical Center, 1998 WL 154623 Cir. 1998). Although the Eighth Circuit's opinion in Wayne a case of first impression for this Circuit, the Court followed several other circuit's opinions. This Court will rely upon only those cases cited with approval in the Wayne opinion

With medical malpractice running rampant in the United States, Congress passed the HCQIA "'to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.'" Bryan v. James E. Holmes Regional Med. ____ Ctr., 33 F.3d 1318, 1321 (11th Cir. 1994), cert. denied, 514 U.S. 1019 (1995) (quoting H.R. Rep. No. 903, 99th Cong., 2d Sess. 2, reprinted in 1986 U.SC.C.A.N. 5287, 6384, 6384). Congress specifically had antitrust laws in mind when passing the HCQIA. 42 U.S.C. § 11101(4); Austin v. McNamara, 979 F2d 728, 733 9th Cir. 1992) (holding that the HCQIA "clearly does apply to antitrust claims."); Mathews v. Lancaster General Hosp., 87 F.3d 624 (3rd Cir. 1996) ("The [HCQIA] was intended to deter antitrust suits by disciplined physicians.")

The Congressionally granted imtrnrnity begins with a determination of whether the action fits under the "professional review action." 42 U.S.C. § 11151(9) . Additionally, the defendant must be one of the statutorily protected groups, including "the professional review body, any person acting a member or staff to the body, any person

under a contract or other formal agreement with the body, and any person who participate with or assists the body with respect to the action." 42 U.S.C. §11111 (a) If a defendant meets those requirements and follows the procedural safeguards set forth in the HCQIA, then the defendant "shall not be liable in damages under any law of the United States, or any State." 42 U.S.C. § 11111(a).

To ensure immunity, a professional review action must be taken by the :defendant and that action must include the following four steps:

> (1) in the reasonable belief that; the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedure are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and.
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). -

& 11112(a).

The HCQIA provides for a presumption that these requirements have been met and plaintiff must rebut this presumption with preponderance *of* the evidence. 42 U.S.C. § 11112(a); Wayne v. Genesis Medical Center, 1998 WL

154623 (8th Cir. 1998) . This presumption in favor of the defendant creates a rather odd summary judgment standard: "Might a reasonable jury, viewing the facts in thc best light for the [plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of 11112(a)?" Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) (citing to Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 254 (1986)).

XXI. Discussion

The facts of this case reveal that the decision to restrict the plaintiff's hospital privileges is clearly protected by the HCQIA. The actions taken against the plaintiff are clearly a protected peer review process. The first step requires that the review body have an objective reasonable belief that the action was in furtherance of quality health care. Wayne v. Genesis Medical Center, 1998 WL 154623 (8th Cir. 1998). The Medical Executive Committee implemented the initial Precautionary Suspension result of specific medical concerns; i.e. delay in initiation ot operation, excessive time of cases excessive blood loss, questionable use of antibiotics and excessive tissue removal The plaintitf argues that testimoily by experts refutes each of the health care concerns. However, the objective reasonable belief standard set *forth* by the Eighth Circuit does not ask whether the health care concerns are true, but whether the review body acted with an objective "reasonable belief that the action *was in* the futherance of quality health *care."* 42 111111(a); Wayne Medical Center WL 154623 (8th Cir. lggg) - The defendant did in fact have such a belief, thereby meeting the first element.

The second step the review body must take is a reasonable effort to obtain the facts. If the defendant did

nothing else, it undertook a thorough investigation of the facts. The defendant appointed the Surgical Review Committee for the sole purpose of looking at the plaintiff's actions. The Medical Executive Committee and the ad hoc committee heard the plaintiff's explanations regarding the medical care concerns. In facts the committees were satisfied with some of the explanations However, concerns with the quality of patient care still existed and the defendant's efforts to obtain the facts were more than reasonable,

Adequate notice and hearing procedures must be followed to meet the third element of the HCQIA. The major limitation on the procedures is that they be "fair to the physician under the circumstances." 42 USC. 11112(a) (3). After setting forth several procedural due process steps. the HCQIA establishes the following safety valve: "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a) (3) of this section." 42 U.SC, § 11112(b). The defendant provided the plaintiff with several levels of hearings and appeals. At each level, the plaintiff was represented by counsel, *was* allowed to object to the individuals sitting on the review committee and was allowed to present evidence. The plaintiff now claims that some of the members of the review committee were in direct economic competition with the plaintiff. However, plaintiff had the opportunity to object to these individuals and did not do so. See Bryan,' 33 F.3d at 1337 finding that a physician waived any objections by failing to cotemporaneously raise those objections). Furthermore, any minor procedural defect does not render the hearing defective duethe safety valve. As such, the plaintiff received adequate notice and hearing procedures.

Finally, the defendant must have acted in the objective reasonable belief that the restriction of privileges was warranted by the facts. 42 U.S.C. § 11112 (a) (4); Wayne v. Genesis Medical Center, 1998 WL 154623 (3th Cir. 1998) . The plaintiff argues that various experts call into question the validity of the allegations brought against him and that none of his patients have ever made complaints against him. However, both of those arguments are irrelevant. The proper inquiry is whether the defendant had an objective reasonable belief that the action was warranted. The HCQIA was designed to prevent medical malpractice before a patient was injured or killed, therefore patient complaints are not material. The quality of patient care brought into question and the individuals that participated in the peer review had an objectively reasonable belief that the restrictions were warranted by the facts. The final restriction was not a suspension, but rather a set of limitations that the plaintiff did not agree to follow. The limitations included further review of the plaintiff's surgical procedures, not a complete ban on the plaintiff practicing medicine in the defendant's facility.

In that the plaintiff has failed to rebut the presumption of immunity, this Court must grant summary judgment in favor of the defendant. All of the plaintiff's claims, breach of contract, antitrust and state law claims, are subject to this immunity.

IV. Conclusion

Accordingly, it is hereby
Scott O. Wright

Senior United States District Judge
June 10, 1998 _____, 1998.

ORDERED that defendant's Motion for Summary Judgment under the Health Care Quality Improvement Act of 1986 (Doc. #155) is granted. It is further

ORDERED that defendant's Motion for Summary Judgment on the Merits of Plaintiff's Claims (Doc. #154) is denied as moot. It is further

ORDERED that plaintiff's Motion for Partial Summary Judgment (Doc. #149) is denied as moot.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

42 U.S.C. § 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et. seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

42 U.S.C. § 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11151. Definitions

In this chapter:

* * *

(4)(A) The term "health care entity" means—

(i) a hospital that is licensed to provide health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

* * *

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect

adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on —

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician—

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

FILED
DEC 20 1999
CLERK

(2)

No. 99-851

IN THE

Supreme Court of the United States

STEPHEN P. SUGARBAKER,

Petitioner,

v.

SSM HEALTHCARE, d/b/a ST. MARYS HEALTH CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming summary judgment against Petitioner under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 ("HCQIA"), by fashioning in harmony with its sister circuits a summary judgment standard tailored to the substantive evidentiary standards that apply to HCQIA cases.

II. Whether the Court of Appeals erred in affirming summary judgment against Petitioner on HCQIA immunity grounds by concluding in harmony with its sister circuits that expert testimony as to the propriety of medical care provided by the adversely affected practitioner cannot rebut the HCQIA presumption that a peer review action was taken in the reasonable belief that it was in furtherance of quality health care or in the reasonable belief that the action was warranted by the facts known.

STATEMENT PURSUANT TO RULE 29.6

SSM Healthcare is a Missouri not-for-profit corporation whose sole corporate member is the Franciscan Sisters of Mary, a religious order of the Roman Catholic Church. There is no parent company, and no publicly held company owns 10% or more of its stock inasmuch as SSM Healthcare is a not-for-profit organization.

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CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS

The decision of the United States Court of Appeals for the Eighth Circuit ("Court of Appeals") is reported at *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999), and is set forth in the Petitioner's Appendix at 1a-27a. The Order of the United States District Court for the Western District of Missouri ("District Court"), dated June 10, 1998, is unreported and is set forth in the Petitioner's Appendix at 28a-34a. Respondent SSM Healthcare, d/b/a St. Marys Health Center ("St. Marys") notes for the Court, however, that the District Court and Eighth Circuit opinions, as reprinted in the Petitioner's Appendix, contain numerous typographical and other errors that impair this Court's ability to readily and adequately understand and consider the opinions below. For this reason alone, the Petition should be denied. *See* Sup. Ct. R. 14.4.

STATEMENT OF THE CASE

A. The Undisputed Facts.

Shortly after securing staff membership and clinical privileges at St. Marys pursuant to a less than forthright medical staff application that failed to disclose his prior failings at other institutions, Petitioner Stephen P. Sugarbaker, M.D. ("Dr. Sugarbaker" or "Petitioner") became the subject of staff complaints about his clinical practice and surgical skills. Once alerted to these concerns, St. Marys undertook an exhaustive and painstaking peer review of Dr. Sugarbaker's practice at the hospital. Although St. Marys is tempted by Dr. Sugarbaker's gross distortions of the record to belabor the Court with a detailed recitation of each step of the peer review process, St. Marys instead refers the Court

to the Eighth Circuit's accurate and concise statement of the facts, which St. Marys hereby adopts and incorporates by reference herein. *See Sugarbaker v. SSM Health Care*, 190 F.3d 905, 908-11 (8th Cir. 1999).

Suffice it to say, that at each stage of this process, St. Marys provided Dr. Sugarbaker with the full panoply of procedural protections, giving him notice and an opportunity to be heard before ultimately restricting his privileges. These restrictions were entirely consistent with and carefully tailored to the health care concerns identified during the peer review process. Specifically, the restrictions would have allowed Dr. Sugarbaker to exercise the vast majority of his clinical privileges and continue practicing at St. Marys, but prevented him from exercising his clinical privileges to perform laparoscopic gall bladder surgery and emergency/trauma surgery until he obtained further training and demonstrated current competence in those areas.

Rather than comply with these conditions, Dr. Sugarbaker sued St. Marys in state court seeking to enjoin it from discharging its obligations under state and federal law to report the restrictions to Missouri's Board of Registration for the Healing Arts and, in turn, the National Practitioner Data Bank. When that attempt failed, Dr. Sugarbaker again challenged St. Marys' peer review action, this time suing St. Marys in federal court for damages and a never-pursued claim for injunctive relief, asserting a Sherman Act claim and five (5) pendent state law claims. Because each of his claims sought to impose liability on St. Marys for its peer review action of restricting his clinical privileges, Dr. Sugarbaker's claims implicated the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 ("HCQIA"), which, among other things, precludes hospitals from being held liable in damages for objectively reasonable peer review actions.

B. The District Court Action.

Accordingly, in both his original and amended complaints, Dr. Sugarbaker alleged as he must that St. Marys' peer review action was not entitled to HCQIA immunity. (R. 21, 1090-91.) St. Marys first moved to dismiss Dr. Sugarbaker's antitrust and state law claims for failure to state a claim. When that proved unsuccessful, St. Marys moved for summary judgment under the HCQIA. The District Court denied this motion as premature and ruled that it could not be re-filed until discovery was completed.

After the close of discovery, St. Marys filed two separate motions for summary judgment. The first reasserted that Dr. Sugarbaker could not sustain his burden of proving that St. Marys' peer review action did not enjoy HCQIA immunity. The second motion asserted that each of his claims failed on the merits. The District Court sustained the first of these motions and denied the second as moot.

In granting summary judgment in favor of St. Marys on Dr. Sugarbaker's claims, the District Court found that St. Marys' "decision to restrict [Dr. Sugarbaker's] hospital privileges is clearly protected by the HCQIA." (App. 31a.) More specifically, because no reasonable jury could conclude on the undisputed facts that Dr. Sugarbaker had rebutted the presumption that St. Marys' peer review action was objectively reasonable, the District Court held that the HCQIA immunized St. Marys from Dr. Sugarbaker's claims. As a result of this decision, St. Marys asked for an award of fees pursuant to 42 U.S.C. § 11113, the HCQIA's fee-shifting provision. The District Court denied St. Marys' motion for fees.

C. The Decision of the United States Court of Appeals for the Eighth Circuit.

Dr. Sugarbaker appealed the District Court's immunity decision in favor of St. Marys, and St. Marys appealed the District Court's denial of St. Marys' motions to dismiss and motion for attorney fees, to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the District Court's order granting summary judgment in favor of St. Marys did not reach the merits of St. Marys' cross-appeal and affirmed the District Court's order denying St. Marys' motion for fees. *Sugarbaker*, 190 F.3d at 918-19 (affirming immunity decision); *Sugarbaker v. SSM Health Care*, 187 F.3d 853 (8th Cir. 1999) (affirming attorney fees decision).

In affirming the HCQIA immunity decision, the Court of Appeals first articulated the appropriate summary judgment standard for the immunity issue. 190 F.3d at 912. It began by noting that this Court's Rule 56(c) decisions require that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). From the HCQIA's evidentiary standard, under which "St. Marys is presumed to have complied with the [HCQIA immunity] standards" and "Dr. Sugarbaker bears the burden of rebutting that presumption," *id.*, the Court of Appeals fashioned the following summary judgment standard: "whether Dr. Sugarbaker satisfied his burden of producing evidence that would allow a reasonable jury to conclude that St. Marys' peer review disciplinary process failed to meet the standards of HCQIA." *Id.* (*quoting Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 839 (3d Cir. 1994)).

The Eighth Circuit affirmed the District Court's decision that Dr. Sugarbaker had not carried that burden, rejecting many of his arguments on appeal as "largely disjointed, conclusory, and sometimes confusing." 190 F.3d at 915. Dr. Sugarbaker now petitions this Court to review that decision. As demonstrated below, however, Dr. Sugarbaker's Petition for Writ of Certiorari (the "Petition") is without merit and should be rejected.

REASONS FOR DENYING THE WRIT

This case does not present issues that warrant review by this Court for two independent reasons. First, Dr. Sugarbaker did not press below any of the issues he now advances and thus failed to preserve them. Second, the Court of Appeals did not resolve the issues identified by Dr. Sugarbaker in direct conflict with the holdings of other courts of appeals or those of this Court. Dr. Sugarbaker's fact-bound claim that the courts below applied improper evidentiary standards likewise does not warrant review by this Court. In the end, the decision below was a plainly correct application of settled law, leaving Dr. Sugarbaker no choice but to attempt to create a split among the circuits where none exists. This Court should deny the Petition because it contains no issues captured by any of the categories set forth in United States Supreme Court Rule 10.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT AGAINST PETITIONER UNDER THE HCQIA BY FASHIONING IN HARMONY WITH ITS SISTER CIRCUITS A SUMMARY JUDGMENT STANDARD TAILORED TO THE SUBSTANTIVE EVIDENTIARY STANDARDS THAT APPLY TO HCQIA CASES.

A. Dr. Sugarbaker Waived Any Argument Concerning the Proper Standard of Review for Summary Judgment Under the HCQIA by Failing to Make That Argument in the Courts Below and Failing to Identify Here Any Exceptional Circumstances That Warrant Review by This Court.

This Court should deny the Petition because Dr. Sugarbaker waived any attempt to attack the proper standard of review for summary judgment under the HCQIA. Dr. Sugarbaker failed to raise this issue in the District Court or in the Eighth Circuit Court of Appeals. In fact, rather than attacking the standard for summary judgment under the HCQIA, he actually recited it as the *proper* standard for review and even relied on the first case that adopted the standard. *See* Brief of Appellant, filed August 21, 1998, at 33 ("[T]he test is, if 'a reasonable jury, viewing the facts in the best light for [Dr. Sugarbaker], [could] conclude that he has shown, by a preponderance of the evidence, that [St. Marys'] actions are outside the scope of [HCQIA immunity],' summary judgment would be inappropriate. *See Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992).");

Reply Brief of Appellant, filed January 21, 1999, at 5 (" '[The] question is whether [a] reasonable jury, **viewing [the] facts in plaintiff's favor**, could conclude he had shown by preponderance of evidence that the defendants' actions fall outside of § 11112(a).' *Wayne v. Genesis Medical Ctr.*, 140 F.3d 1145, 1149 (8th Cir. 1998) (emphasis added)."); Plaintiff's Suggestions in Opposition to St. Marys' Motion for Summary Judgment Under the Health Care Quality Improvement Act of 1986, filed May 29, 1998, at 25 (same).

Dr. Sugarbaker is estopped from attacking the very standard that he embraced in the District Court and the Court of Appeals. *See Steagald v. United States*, 451 U.S. 204, 208-211 (1981) (finding that government, by making contrary assertions in the courts below, had waived its right to raise such issues in this Court); *Hossaini v. Western Missouri Med. Ctr.*, 140 F.3d 1140, 1142-43 (8th Cir. 1998) (noting that the doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same litigation); *Gregory v. Missouri Pacific Ry. Co.*, 32 F.3d 160, 164-65 (5th Cir. 1994) (holding that a party cannot take one position before the district court and then take an inconsistent position on appeal). For this reason alone, Dr. Sugarbaker's Petition should be denied.

Furthermore, this Court has held repeatedly that absent exceptional circumstances it will not consider issues raised for the first time in this Court. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1968 n.3 (1999) (refusing to consider issue that was neither raised nor considered below); *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (refusing to consider issue that was neither raised before nor addressed by either the district court or the court of appeals); *Duignan v. United*

States, 274 U.S. 195, 200 (1927) (same). Here, Dr. Sugarbaker has failed not only to acknowledge in this Court that he did not raise this issue below, but also to point to any exceptional circumstance that would allow this Court to consider this issue. Dr. Sugarbaker simply did not preserve this issue for the Court's review.

There is nothing exceptional about this case that would warrant consideration of an issue that was never raised below and on which this Court would not have the benefit of consideration by the lower courts. Only errors that are of a "fundamental or jurisdictional character" could possibly warrant review under these circumstances. *See Magruder v. Drury*, 235 U.S. 106, 113 (1914). The standard of review for summary judgment under the HCQIA cannot be considered either fundamental or jurisdictional. *See Gila Valley, Globe & Northern Ry. Co. v. Hall*, 232 U.S. 94, 98-99 (1914) (refusing to hear matters not jurisdictional nor essential to the foundation of the action, but involving a mere matter of procedure, that were not raised in the courts below). *Cf. Youakim v. Miller*, 425 U.S. 231 (1976) (addressing issue not raised below in order to resolve conflict between state and federal statutes concerning claim that the Illinois foster care program is in conflict with the Social Security Act). The Petition should therefore be denied.

B. The Court of Appeals Properly Affirmed Summary Judgment Against Dr. Sugarbaker By Applying the Summary Judgment Standard That Has Been Applied by All Courts of Appeals That Have Faced the HCQIA Immunity Issue.

Perhaps recognizing that no reviewable conflict exists in this case, Dr. Sugarbaker resorts to misconstruing the record and the relevant case law in an effort to manufacture one. Contrary to Dr. Sugarbaker's erroneous assertions, however, every court of appeals that has considered summary judgment under the HCQIA has applied the same standard of review and none of their opinions reflect any disagreement on that score. *See, e.g., Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 633 (3d Cir. 1996); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995); *Smith v. Ricks*, 31 F.3d 1478, 1485 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995).

Undettered by this unanimous precedent, Dr. Sugarbaker nonetheless argues that the Tenth Circuit has refused to apply the standard of review adopted by the other circuits. (Petitioner's Brief ("Br.") at 7.) This argument is patently incorrect. The Tenth Circuit, in *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997), actually adopted the same standard that all the other circuits have applied. *Id.* at 1334 n.9 ("[T]he proper inquiry for the court is whether Dr. Brown has provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a)."). Thus, the courts of appeals have unanimously and properly adopted the standard applied by the Eighth Circuit below and, therefore, there is no reason for review by this Court. *See* Sup. Ct. R. 10(a).

Even if this Court were to somehow excuse Dr. Sugarbaker's waiver of the issue and overlook the unanimity of the courts of appeals, the issue is still not reviewable. Contrary to Dr. Sugarbaker's argument, there has been no "misapplication" by the lower courts of the burden of proof for summary judgment. (Br. at 7.) Rather, the courts have merely followed and applied this Court's directive that a court upon a motion for summary judgment must view the evidence presented through the "prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). As a result, this Court should deny the Petition because Dr. Sugarbaker has manufactured an argument that borders on frivolous by confusing the issue of the propriety of a rebuttable presumption with the standards concerning the burden of proof for summary judgment.

It is well-settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test — "no genuine issue as to any material fact" — is satisfied and that the movant is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-25 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); Fed. R. Civ. P. 56(c). Because the burden is on the movant, the evidence presented to the court is always construed in favor of the party opposing the motion and the non-moving party is given the benefit of all favorable inferences that can be drawn from it. *Matsushita*, 475 U.S. at 487. A moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a showing on an essential element of his case with respect to which he has the burden of proof. *Celotex*, 477 U.S. at 322-23. In ruling upon a motion for summary

judgment, however, the court must view the evidence presented through "the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254.

The prism of the substantive law applicable to this case is the presumption that a professional review action meets the standards of immunity, "unless the presumption is rebutted by a preponderance of the evidence." 42 U.S.C. § 11112(a). Tailoring the summary judgment standard to the substantive law of HCQIA immunity, the courts of appeals have articulated the standard as follows: "Might a reasonable jury, viewing the facts in the best light for [plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?" *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992). *See also Bryan*, 33 F.3d at 1333 ("In a sense, the presumption language in HCQIA means that the *plaintiff* bears the burden of proving that the peer review process was *not* reasonable."); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 879-80 (3d Cir. 1995) (holding that the HCQIA's rebuttable presumption "necessarily implies that plaintiffs bear the burden of proving noncompliance with the [HCQIA's] standards" and, as such, requires physician plaintiffs to plead and prove the absence of HCQIA immunity as an essential element of their claim), *appeal after remand*, 167 F.3d 832 (3d Cir. 1999).

The *Austin* court and every other court of appeals that has since followed its summary judgment standard of review in HCQIA cases merely complied with this Court's mandate to account for the substantive evidentiary burden that will be applicable at trial. As this Court has stated:

> It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Anderson, 477 U.S. at 254-55. That is precisely what all of the courts of appeals have done in the context of the HCQIA. The so-called "unconventional twist" to the summary judgment analysis applied by the Eighth Circuit likewise comports with this Court's mandate that " 'the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.' " *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 913 (8th Cir. 1999) (*quoting Anderson v. Liberty Lobby*, 477 U.S. at 255). Therefore, there has been no improper "judicial realignment" of the burden of proof as Dr. Sugarbaker erroneously suggests. (Br. at 11.)

Dr. Sugarbaker also argues that HCQIA immunity is an affirmative defense on which St. Marys bears the burden of proof. (Br. at 10-11.) Dr. Sugarbaker is wrong. Indeed, the very language of the statute imposes on the plantiff the burden of proving that the defendant hospital does not meet the requirements of the statute. § 11112(a). It is for this reason

that the Third Circuit has held that the absence of HCQIA immunity is an essential element of the plaintiff's claim. *Brader*, 64 F.3d at 879-80. *See also Bryan*, 33 F.3d at 1333. The HCQIA summary judgment standard fashioned by the courts of appeals thus does nothing more than require a plaintiff such as Dr. Sugarbaker to carry his burden of proof on an essential element of his claim. Dr. Sugarbaker's argument should therefore be rejected.

Even assuming *arguendo* that the courts of appeals have misapplied the summary judgment standard or that the Eighth Circuit resolved conflicts in evidence in the light most favorable to St. Marys, as Dr. Sugarbaker argues, review by this Court still is not warranted. Misapplication of a properly stated rule of law is "rarely" a reason for this Court to grant a petition. Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts."); *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.") (and cases cited therein). For these reasons, the Petition should be denied.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT AGAINST PETITIONER ON HCQIA IMMUNITY GROUNDS BY CONCLUDING IN HARMONY WITH ITS SISTER CIRCUITS THAT EXPERT TESTIMONY AS TO THE PROPRIETY OF MEDICAL CARE PROVIDED BY THE ADVERSELY AFFECTED PRACTITIONER CANNOT REBUT THE HCQIA PRESUMPTION THAT A PEER REVIEW ACTION WAS TAKEN IN THE REASONABLE BELIEF THAT IT WAS IN FURTHERANCE OF QUALITY HEALTH CARE OR IN THE REASONABLE BELIEF THAT THE ACTION WAS WARRANTED BY THE FACTS KNOWN.

There is no conflict among the federal courts of appeals, or between the decision below and those of this Court, to justify granting the instant Petition. *See* Sup. Ct. R. 10; *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (grant of certiorari warranted where courts of appeals decisions "squarely conflicted."). Dr. Sugarbaker mistakenly asserts that the Eighth Circuit decision below squarely conflicts with the Tenth Circuit's decision in *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997). Similarly, Dr. Sugarbaker mischaracterizes both this Court's decision in *Patrick v. Burget*, 486 U.S. 94 (1988), and the HCQIA's legislative history in a misguided attempt to conjure a conflict between the decisions below and this Court's jurisprudence. As demonstrated below, both of these attempts to create a conflict are unavailing and cannot justify the issuance of a writ.

A. There is No Conflict Between or Among the Courts of Appeals, As Required to Grant Dr. Sugarbaker's Petition.

The decision of the Court of Appeals does not conflict with any decision of its sister circuits. Dr. Sugarbaker argues that the Tenth Circuit held in *Brown* that "medical expert witness testimony submitted by a plaintiff is sufficient evidence to overcome the statutory presumption under HCQIA and to raise a genuine issue of material fact." (Br. at 12.) Dr. Sugarbaker, however, has improperly oversimplified the *Brown* decision, glossing over its precise holding in an effort to manufacture a conflict where none exists. Indeed, upon a more careful analysis, the *Sugarbaker* and *Brown* decisions do not conflict at all.

The Eighth Circuit had no reason to and did not expressly disagree with the Tenth Circuit's holding in *Brown*. The HCQIA immunity decision in *Brown* turned on the second prong of the immunity analysis; *i.e.*, whether the defendant hospital conducted a reasonable factual investigation. There, the defendant hospital based its decision to terminate the medical staff privileges of the plaintiff, Dr. Brown, on a review of just two (2) patient charts. *Brown*, 101 F.3d at 1328. The Tenth Circuit affirmed the district court's denial of the defendant's motion for judgment as a matter of law. The court held that HCQIA immunity was not available as a matter of law because the evidence could support a verdict that the defendant hospital had not engaged in a reasonable effort to obtain the facts of the matter. *Id.* at 1333-34. In reaching this decision, the court relied in part on expert testimony that the hospital's two-chart review was "unreasonably restrictive." *Id.*

In this case, by contrast, Dr. Sugarbaker did not present any expert testimony whatsoever with respect to the

reasonable investigation prong of the HCQIA analysis. None of his experts opine that St. Marys' exhaustive review of twenty-five (25) cases did not constitute a reasonable factual investigation. No expert opines that the countless hours St. Marys spent investigating this matter, including a six (6)-hour particularized review of six (6) of Dr. Sugarbaker's surgical cases and a lengthy appellate review of those cases, were unreasonably truncated. There simply is no expert testimony as to the reasonableness of St. Marys' investigation similar to that proffered in *Brown* such that the decisions below squarely conflict with that of the *Brown* court.

Instead, all of Dr. Sugarbaker's experts opine on the propriety of medical care delivered by Dr. Sugarbaker (R. 2586-89, 2606-11, 2616-21, 2623-24), an issue wholly distinct from the issue of whether St. Marys' factual investigation was reasonable. Dr. Sugarbaker proffered that testimony in support of his argument that St. Marys did not have a reasonable belief that its peer review action was in furtherance of quality health care or was warranted by the facts known. *See* §§ 11112(a)(1) and (4). No court of appeals has specifically held that such expert testimony is sufficient to rebut the presumption that a peer review action satisfies those two prongs of the HCQIA analysis. There is thus no conflict between or among the courts of appeals for this Court to review and resolve.

With respect to the reasonable investigation prong of the HCQIA analysis, the Eighth Circuit below carefully reviewed both the factual record regarding the investigation and Dr. Sugarbaker's arguments "that certain alleged deficiencies undermine the reasonableness of the fact gathering process in this case" and found "no merit in any

of his contentions." 190 F.3d at 915. Unlike the Tenth Circuit in *Brown*, the Court of Appeals here did not rely on any expert testimony in making this decision, precisely because the record did not contain any. Rather, after reviewing the facts and circumstances of St. Marys' factual investigation, the Court of Appeals endorsed the "view expressed by the District Court: 'if St. Marys did nothing else, it undertook a thorough investigation of the facts.' " *Id. Brown* is thus both factually and analytically distinguishable and does not conflict with the decision below.

Even if the distinctions between the decisions below and *Brown* are somehow discounted, review by this Court is still unwarranted because Dr. Sugarbaker has at most identified a "misapplication of a properly stated rule of law," an error which only "rarely" results in a petition for writ of certiorari being granted. *See* Sup. Ct. R. 10. Both the Eighth Circuit in *Sugarbaker* and the Tenth Circuit in *Brown* properly stated the applicable rule of law; *i.e.*, the four-pronged HCQIA immunity analysis under which the plaintiff must rebut the presumption of immunity by a preponderance of evidence. *See Sugarbaker*, 190 F.3d at 912; *Brown*, 101 F.3d at 1333. Therefore, even assuming *arguendo* that the decisions squarely conflict, which they do not, they conflict only as to the courts of appeals' differing applications of this well-established HCQIA legal principle. Whether real or imagined, this conflict simply is not an "important federal question" that presents a "compelling reason" to grant Dr. Sugarbaker's Petition. *See* Sup. Ct. R. 10.

Review is unwarranted for the additional reason that any tension between the decisions arises in the context of a

developing area of the law that has yet to "percolate" in the circuit courts of appeals. In *United States v. Mendoza*, 464 U.S. 154 (1984), this Court reaffirmed its longstanding principle that several appellate courts should explore a particular issue before certiorari is granted. *Id.* at 160. Here, only four courts of appeals have even arguably addressed the question that Dr. Sugarbaker asks this Court to review. The First, Second, Fifth, Sixth, Seventh, Ninth and D.C. Circuits have yet to weigh in on this issue. Dr. Sugarbaker's petition thus founders upon the *Mendoza* rule and should be denied.

B. There is No Conflict Between the Decision Below and Those of This Court, As Required to Grant Dr. Sugarbaker's Petition.

Nor is there a direct or apparent conflict between the decisions below and those of this Court as Dr. Sugarbaker would have the Court believe. Dr. Sugarbaker argues that the Eighth Circuit's decision below, and those of its sister circuits, conflict with this Court's decision in *Patrick v. Burget*, 486 U.S. 94 (1988). This argument is wholly illusory for two reasons. First, Dr. Sugarbaker waived it by failing to raise it below. Not once did Dr. Sugarbaker argue that *Patrick* had any bearing on, much less controlled, the issues before the District Court and the Court of Appeals. By thus failing to preserve this issue, Dr. Sugarbaker cannot now press it for the very first time in this Court. *See Grupo Mexicano*, 119 S. Ct. at 1968 n.3; *Yeskey*, 118 S. Ct. at 1956.

Second, *Patrick* has absolutely nothing to do with any of the issues for which Dr. Sugarbaker is seeking review. In *Patrick*, this Court held that *Parker v. Brown*, 317 U.S.

341 (1943), state action immunity from antitrust liability was, on the record therein, not available to a hospital for its peer review actions. 486 U.S. at 105. To be sure, the Court made a passing reference to the HCQIA as a recently enacted statute in which Congress declined to categorically exempt peer review from the reach of the antitrust laws, but which had no retroactive effect in that case. *Id.* at n.8. Not a single syllable in *Patrick*, however, speaks to the HCQIA immunity analysis, the evidentiary standards created by the statute or the type or quantum of evidence necessary to satisfy those standards. *Patrick* is, quite simply, irrelevant herein.

Dr. Sugarbaker contends that "[i]n adopting HCQIA, Congress made clear [in the HCQIA's legislative history that] the physician's claim reviewed by this Court in [*Patrick*] was not the type of claim HCQIA intended to prevent." (Br. at 14-15.) Dr. Sugarbaker is wrong. Indeed, Congress never mentioned *Patrick* anywhere in the HCQIA's legislative history. This is not surprising given that *Patrick* was decided two years after the HCQIA was enacted. There is absolutely no indication in any of that history that Congress believed that HCQIA immunity would not be available on the facts at issue in *Patrick*. Dr. Sugarbaker's argument to the contrary must therefore be rejected.

At bottom, then, Dr. Sugarbaker argues that the facts of this HCQIA immunity case are analogous to those of a decision by this Court interpreting *Parker v. Brown* state action immunity. The incongruity of this purported factual analogy is readily apparent. Even if it were somehow apt, the analogy suggests only a misapplication of settled HCQIA immunity principles, a putative error that cannot justify review by this Court. *See* Sup. Ct. R. 10. Dr. Sugarbaker has not demonstrated any conflict whatsoever between the HCQIA jurisprudence and any decision of this Court or any other basis for granting his Petition.

CONCLUSION

For the foregoing reasons, authorities and equities, the Petition should be denied because the issues raised by Dr. Sugarbaker do not merit further review by this Court. The Petition presents no important question of federal law nor any conflicts among or between the circuit courts of appeals. For the foregoing reasons, St. Marys respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 99-851

In the

Supreme Court of the United States

STEPHEN P. SUGARBAKER,

Petitioner,

versus

SSM HEALTHCARE, d/b/a ST. MARYS HEALTH CENTER .,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

St. Marys[1] makes no attempt to dispute the fundamental contention in Dr. Sugarbaker's petition ("Petition") that physicians are routinely denied access to federal courts through application of an "unconventional" and "unusual" burden of proof standard of review for summary judgment.

St. Marys conspicuously fails to discuss the controlling decision of this Court, *Lavine v. Milne*, 424 U.S. 577 (1976), that a statutory rebuttable presumption (i.e., HCQIA) "carries with it no procedural consequence." *Id.* at 584.

St. Marys misapprehends the basis for the Petition and misstates the record. The Petition concerns the Eighth Circuit's realignment of the "burden of proof" to Dr. Sugarbaker under the "summary judgment standard of review." *See* App. at 11a. Dr. Sugarbaker did not at any time acquiesce in an altered burden of proof on summary judgment as St. Marys alleges. This will be shown below.

Contrary to St. Marys' suggestion, the Courts of Appeals *are* in conflict over whether the testimony of a medical expert who can prove there was no reasonable basis for a hospital's disciplinary action against a physician is irrelevant. *See* App. at 15a (holding "the affidavit of . . . an independent surgeon [regarding] the quality of Dr. Sugarbaker's care . . . is irrelevant to our objective inquiry"); *compare Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 n.9 (10th Cir. 1996) (explicitly rejecting the hospital's argument that a "difference of opinion among [medical] experts does not raise an issue as to the objective

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[1] Dr. Sugarbaker uses the terms defined in his Petition for a Writ of Certiorari herein. "St. Marys Brief at _" refers herein to Respondent's Brief in Opposition.

reasonableness of the inquiry"). This Court should grant certiorari to resolve the conflict. *See* S. Ct. R. 10.

STATEMENT OF THE CASE

Dr. Sugarbaker will not respond to every inaccurately portrayed fact or legal assertion made by St. Marys, but he will address or clarify a few. St. Marys' rosy picture of offering Dr. Sugarbaker the "vast majority" of his privileges while under limited "restriction" at St. Marys is absurd. *See* St. Marys Brief at 2. St. Marys' offer required Dr. Sugarbaker to fully "release" St. Marys and all the peer review participants in exchange for **one year** of conditional, restricted privileges (R. 3367). St. Marys' offer was a disguised termination for which St. Marys' own expert could "question[ ] the good faith of St. Marys" (R. 2643).

Contrary to St. Marys' suggestion, Congress determined "only professional review actions . . . eligible for immunity under [HCQIA] are those based on the **competence** or professional conduct of an individual physician." H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6403-04 (emphasis added). St. Marys did not at any time find Dr. Sugarbaker to be "incompetent" or engaged in unprofessional conduct (R. 2715, 2720-22). Indeed, St. Marys admits: "[T]he peer review record [of Dr. Sugarbaker] contains evidence that, in the six cases [under review]. . . . Dr. Sugarbaker provided acceptable care" (R. 1518).

II. THE SUBSTANTIVE EVIDENTIARY STANDARDS UNDER HCQIA DID NOT IMPOSE UPON DR. SUGARBAKER THE BURDEN OF PROOF FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56 AND HE IS NOT ESTOPPED FROM SEEKING RELIEF IN THIS COURT.

St. Marys argues Dr. Sugarbaker "is estopped from attacking the very standard that he embraced in the District Court and the Court of Appeals." *See* St. Marys Brief at 7. St. Marys' argument is in error. Dr. Sugarbaker seeks relief from this Court due to the Eighth Circuit's shifting to Dr. Sugarbaker of the burden of proof on the "summary judgment standard of review." *See* App. at 11a.

St. Marys cites *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), for the proposition that the "determination of whether a given factual dispute requires submission to a jury must be **guided** by the substantive evidentiary standards that apply to the case." *Id.* at 255 (emphasis added). Dr. Sugarbaker agrees. But this "guide" does not impose upon the non-moving party, Dr. Sugarbaker, the burden on "summary judgment," i.e., whether there exists a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U. S. 317, 325 (1986).

Under this Court's longstanding jurisprudence, the moving party retains the burden on summary judgment and that burden is not "discharged" unless and until the moving party makes a "'showing' . . . there is an absence of evidence to support the non-moving party's case." *Id.* This rule applies equally to those issues for which the non-moving party (i.e., Dr. Sugarbaker) ultimately bears the burden of proof at trial. *Id.* ("[T]he burden on the moving party ['with respect to an issue on which the non-moving party bears the

burden of proof"] may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case").

Immunity is a defense, *see Wilson v. Layne*, 526 U.S. 603, 605-606, 119 S. Ct. 1692, 1695 (1999), and thus can be waived, *see Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026, 1030 (4th Cir. 1994). St. Marys, not Dr. Sugarbaker, filed the motion for summary judgment on its immunity defense. St. Marys, not Dr. Sugarbaker, ultimately bears the burden of proof "on summary judgment" even though "the evidentiary standards that apply to the case" impose upon Dr. Sugarbaker the burden of proof with regard to one element of HCQIA immunity.[2] The Eighth Circuit and the Courts of Appeals it follows have erred in imposing the burden of proof for summary judgment on the non-moving party (i.e., Dr. Sugarbaker).

Dr. Sugarbaker acknowledged in the District Court and the Eighth Circuit the "guide" used by the courts **in the first instance** for motions for summary judgment under HCQIA. *See* App. at 11a. Dr. Sugarbaker never acknowledged or "embraced" the view that this "guide" was dispositive of a motion for summary judgment or that the burden of proof "for summary judgment" shifted to him.

Indeed, after citing the "guide," Dr. Sugarbaker quoted to the Eighth Circuit that part of Fed. R. Civ. P. 56 that provides "[s]ummary judgment may be rendered only if .

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[2] The Eighth Circuit erred in holding Dr. Sugarbaker must show by a preponderance of the evidence that "St. Marys is not entitled to statutory immunity under the HCQIA." *See* App. at 23a. Three elements must be present for St. Marys to have statutory immunity. A [1] "professional review body" (or other protected person) [2] must take a "professional review action" [3] that "meets all the standards in Section 11112(a)." 42 U.S.C. § 11111(a)(1). Dr. Sugarbaker bears the burden of proof by a preponderance of the evidence **only** with regard to the third element shown above. *See* 42 U.S.C. § 11112(a).

. . 'there is no genuine issue as to material fact.'" *See* Brief of Appellant dated August 21, 1998 at 33. Dr. Sugarbaker explicitly argued to the Eighth Circuit that his **only** burden in opposing St. Marys' motion was to "submit evidence," not to carry St. Marys' burden of showing an absence of any genuine issue of material fact. *See* Reply Brief of Appellant dated January 21, 1999 at 5 ("Dr. Sugarbaker's burden is only to submit evidence 'such that a reasonable jury **could** return a verdict for [him].'" (emphasis in original)).

This Court will ordinarily consider a petition for certiorari challenging a lower court ruling so long as the petitioner merely "challenged [that] ruling" in the court of appeals below. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This rule applies even when "[i]t is not entirely clear that appellants suggested the same interpretation in the District Court as they suggest here." *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). This Court ordinarily declines to review only when the "questions [were either] not pressed or passed upon below." *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The Petition seeks review of whether the "lower court erred in affirming summary judgment." *See* Petition at i. This issue was both "pressed" by Dr. Sugarbaker and "passed upon" by the Eighth Circuit. The decisions of this Court upon which St. Marys relies prohibit a party only from raising before this Court "factual issues" when "it has made contrary assertions in the courts below." *See Steagald v. United States*, 451 U.S. 204, 209 (1981). Dr. Sugarbaker seeks this Court's review of questions of law, not "factual issues."

Finally, St. Marys contends the "standard of review for summary judgment under the HCQIA cannot be considered . . . fundamental." *See* St. Marys Brief at 8. This contention should give the Court pause. Nothing could be

more fundamental than the standard under which the burden of proof on summary judgment is applied. *Cf. Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive of the outcome of the litigation . . . .").

III. THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER TESTIMONY FROM A PLAINTIFF'S PEER REVIEW EXPERT IS RELEVANT.

St. Marys contends that "expert testimony as to the propriety of medical care provided by [a physician] cannot rebut the HCQIA presumption." *See* St. Marys Brief at 14. This contention is not true in the Tenth Circuit. *See Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 (10th Cir. 1996). St. Marys argues *Brown* is not in conflict with the Eighth Circuit and other Courts of Appeals because *Brown* "turned on the second [of four] prong[s] of the [HCQIA] immunity analysis." *See* St. Marys Brief at 15. St. Marys is wrong.

First, St. Marys' argument that *Brown* "does not conflict" with other Courts of Appeals decisions, *see* St. Marys Brief at 17, is directly contrary to an argument it made to the Eighth Circuit. *See* Reply Brief of Appellant SSM Healthcare Central Region d/b/a St. Marys Health Center at 16-17 (8th Cir. Jan. 12, 1999) ("*[Brown]* conflicts with HCQIA[]").

Second, St. Marys' argument slices *Brown* much too thinly. *Brown's* holding that "the district court did [not] err in failing to find [the hospital and others] immune, as a matter of law," was unmistakably premised on the Tenth Circuit's determination that a "'difference of opinion among experts'. .

. raise[s] an issue as to the objective reasonableness" of the hospital's action. *See Brown*, 101 F.3d at 1334 n.9. Under Tenth Circuit precedent, the expert opinions offered by Dr. Sugarbaker are relevant. In the Eighth Circuit and other Courts of Appeals, they are "irrelevant." A clear conflict exists.

Under the evidentiary standards adopted by the Eighth Circuit and Courts of Appeals other than the Tenth Circuit, it is virtually impossible for a physician to avoid summary judgment. These Courts of Appeals hold that their review of the evidence is under an "objective" standard and that the "subjective" views of hospital peer reviewers are "irrelevant." *See* App. at 11a, 15a, 16a. At the same time, these courts inconsistently proclaim that **objectively** "'incorrect conclusion[s] on . . . medical issue[s]'" by hospital peer reviewers are "irrelevant." *See* App. at 15a. These conflicting standards get the aggrieved physician coming and going. A competent physician, who can prove his competence but is the victim of unlawful action by a hospital's peer review procedures, cannot overcome summary judgment and otherwise has no legal recourse under the evidentiary standards adopted by the Eighth Circuit and other Courts of Appeals. Only the Tenth Circuit applies a rule in accord with Congress' intent under HCQIA.

CONCLUSION

The law abhors privileges and none more so than immunity. Congress refused to grant broad immunity to hospitals under HCQIA, granting instead only a presumption that could be overcome by a mere preponderance of the evidence. The Eighth Circuit and other Courts of Appeals have imposed an "unconventional" and "unusual" burden of proof "on [the] summary judgment standard of review" to uniformly deny physicians access to federal court. The

Courts of Appeal (except the Tenth Circuit) also have declared relevant evidence of a physician's competence—the sole interest of HCQIA—to be "irrelevant" to their analysis. This Court should grant the Petition.

Respectfully Submitted,

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